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Supreme Court, U.S.
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No. —

IN THE
SUPREME COURT OF THE UNITED STATES

BRIARPATCH LIMITED, L.P. AND GERARD F. RUBIN,

Petitioners,

v.

GEISLER ROBERDEAU, INC., PHOENIX PICTURES, INC., AND MORRIS 'MIKE' MEDAVOY,

Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The following questions are presented for review:

1. Where prior state court adjudications, applying state corporation and limited partnership statutes, found the agreements, copyrights, and other property at issue actually "belong to", and are "owned by", "property of", and "vested in" petitioner limited partnership and as a matter of law cannot have been assigned to respondent, and those state court adjudications were recorded in the United States Copyright Office, did the federal courts err by subsequently ignoring those state statutes and state court adjudications as to petitioners' ownership of that property and instead declaring that property to be owned by respondents?

2. Did the federal appellate court err in affirming summary judgment on its *sua sponte* application of a state law affirmative defense ("bona fide purchaser for value") where that appellate court did not apply required elements of that state law defense, and those required elements were contrary to or not supported by the district court findings?

3. Did the federal appellate court err in affirming summary judgment on the basis of no "actual notice" to respondents, where a hostile witness testified at deposition that he believes (but does not recall with absolute certainty) he delivered and so put respondents on "actual notice" of a key document, and the credibility of that witness testimony is a matter for decision of the jury?

4. Where the federal district court judge without provocation has announced on the record that he wants petitioners' attorney "dead" and respondent's counsel later states on the record "I never heard a judge say such a thing. I couldn't believe it when I heard it", did the appellate court err by failing to review with additional scrutiny the district court adjudications against petitioner or otherwise failing to question conduct of the district court judge?

PARTIES INVOLVED

Petitioners are plaintiffs Briarpatch Limited, L.P. (the "Partnership", a New York limited partnership) and Gerard F. Rubin ("Rubin"), the sole limited and designated winding up partner of the Partnership.

Respondents are defendants Phoenix Pictures, Inc. ("Phoenix") and Morris 'Mike" Medavoy ("Medavoy"), the chief executive officer of Phoenix.

CORPORATE DISCLOSURE STATEMENT

Petitioner Partnership is a New York limited partnership, of which Petitioner Rubin has been and is sole limited and designated winding up partner. The Partnership has no general partners, as all former corporate general partners were dissolved, and pursuant to New York Revised Limited Partnership Act §121-402(i), upon a corporate general partner's dissolution, the dissolved corporation automatically ceases to be a general partner.

Respondent Phoenix has informed Petitioners that the following parent corporations and public companies hold 10% or more of its stock: Sony Pictures Entertainment, Inc., Onex DHC LLC and Freemantle Media, a subsidiary of RTL Group S.A. Respondent Medavoy has been chief executive officer and a principal of Phoenix.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Briarpatch Limited, L.P. (the "Partnership") and Gerard F. Rubin ("Rubin", as sole limited and designated winding up partner of the Partnership) respectfully pray that a writ of certiorari issue to review the opinion and order of the United States Court of Appeals for the Second Circuit decided and entered March 2, 2009, as to which the Second Circuit by order entered April 24, 2009 refused to grant panel or en banc rehearing.

OPINIONS BELOW

The decision sought to be reviewed, namely the Decision and Judgment of the Second Circuit Court of Appeals (App. A), was reported at 312 Fed. Appx. 433 and at 2009 Copr. L. Dec. P29,722. The Second Circuit's order denying panel and en banc rehearing (App. G) was unreported.

The District Court opinion (App. B) was unreported, but is available on Westlaw, 2007 WL 1040809.

The New York Supreme Court's underlying post-trial Findings of Fact, Conclusions of Law and Decision dated July 12, 1999, its Order and Judgment entered October 14, 1999 (App. E), and its Judgment and Order dated May 9, 2006 (App. F) were all recorded in the United States Copyright Office, but were unreported.

STATEMENT OF JURISDICTION

At issue is the decision of the United States Court of Appeals for the Second Circuit (App. A) entered, and related Mandate issued, March 2, 2009. Petitioners' timely petition for panel rehearing or en banc rehearing was denied by order filed and entered April 24, 2009 (App. G).

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(a) and Supreme Court (i) Rule 10(a) in that the Second Circuit entered a decision in conflict with prior decisions of other United States Courts of Appeals in the same important matter; (ii) Rule 10(b) in that the Second Circuit decided an important question of federal law that has not been, but should be, settled by this Court, and (iii) Rule 10(c) in that the Second Circuit decided an important federal question in a way that conflicts with relevant decisions of this Court.

RELEVANT PROVISIONS INVOLVED

At issue is the language of and policy behind 28 U.S.C §1738, requiring federal courts to give state statutes and state court adjudications "the same full faith and credit ...as they have by law or usage in the courts of such state", and thus requiring federal courts to give full faith and credit to state laws governing ownership of, and authority to transfer, property. See also the "due process" clause of the Fifth Amendment to the United States Constitution ("No person shall be ... deprived of ... property, without due process of law").

The federal copyright statute 17 U.S.C. §204 provides that a transfer of copyright ownership may be made only "by operation of law" or by "an instrument of conveyance, or a note or memorandum of that transfer, ... in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent". However, the "owner" of, and "duly authorized agent" to transfer, rights at issue (whether or not copyright property) is determined by state property law, such as limited partnership and corporation statutes governing ownership, transfer, and authority to transfer limited partnership property.

Thus, ownership of and authority to transfer property (whether copyright or non-copyright property) of a New York limited partnership (such as Petitioner Partnership) is governed by the New York Revised Limited Partnership Act ["NY RLPA"] – such as NY RLPA §121-701 ("a partner has no interest in specific partnership property") and §121-402(i) (a corporation upon its dissolution automatically ceases to be and is disqualified from serving as a general partner of the partnership).

Likewise, transfer of copyright or non-copyright property by a dissolved New York corporation [such as Briarpatch Film Corp. ("BFC"), a former named general partner of Petitioner Partnership] is governed and so restricted by New York Business Corporation Law §1005(a) which provides that a dissolved corporation [such as BFC] can dispose of only "its" own property, and so has no authority to dispose of or otherwise deal with

property of another [and thus no authority to transfer property of the Partnership].

The Federal Rules of Civil Procedure implicated include Rule 56 (requiring denial of a summary judgment motion where there is a "genuine issue as to any material fact").

Also at issue is the appropriate standard of review of findings and conclusions of a District Court Judge whose comments indicate substantial bias or prejudice against a party's attorney (whom the Court announced it wants "dead"). See 28 U.S.C. §455.

SUMMARY

1. Nature and Overview of the Dispute.

This case arises from a dispute, originally litigated in 1999 in New York state court, between, on the one hand, Petitioners (the Partnership and its sole limited and designated winding up partner Rubin) and, on the other hand, faithless fiduciaries, namely non-partners Robert Geisler ("Geisler") and John Roberdeau ("Roberdeau"). After trial, the New York state court issued a 31-page Decision finding plaintiffs Partnership and Rubin funded acquisition of rights for and development of, and have an at least $750,000 investment in, The Thin Red Line Project; that Project was and is owned by the Partnership; and Geisler/Roberdeau breached their fiduciary duties to, and committed fraud, fraudulent concealment, conversion, misappropriation, and other misconduct against, Petitioners Partnership/ Rubin, as Geisler/Roberdeau converted $1.5 million

received by their new company Geisler Roberdeau, Inc. ("GRI") from Phoenix Pictures, Inc. ("Phoenix") with respect to that Project.

The New York state court then issued its 1999 Judgment which (among other things) ordered immediate delivery to plaintiffs Partnership/Rubin of all agreements, screenplays, and other documents with respect to The Thin Red Line Project "since they belong to and are the property of the Partnership" and enjoined RG/JR [namely Geisler/ Roberdeau, their dissolved New York corporation BFC, and GRI] from holding themselves out as having any right, title, or interest in or to The Thin Red Line Project "as all such rights, title, and interest are vested in and belong to the Partnership".

Respondent Phoenix refused to recognize the Partnership's adjudicated rights to the agreements, screenplays, and other rights to The Thin Red Line Project. Instead, Phoenix asserted it had entered into an Option Agreement during 1996 (and thus more than two years after January 1994 formation of the Partnership and dissolution of BFC) with RG/JR and, pursuant to that Option Agreement, had subsequently obtained a quitclaim of faithless fiduciaries RG/RJ's rights to the agreements and screenplays.

The Partnership then brought suit in New York state court against GRI, Phoenix, and Medavoy for declaration that those agreements, screenplays, and other rights (which the NY court already found to be owned by the Partnership) had not been validly

assigned to Phoenix; that suit was removed by Phoenix to federal court; and the Second Circuit Court of Appeals therein rendered a June 2004 Decision [*Briarpatch Limited, L.P. v. Phoenix Pictures, Inc.*, 373 F. 3d 296] explicitly acknowledging the state court adjudications that The Thin Red Line Project was owned by the Partnership and did not belong to RG/JR. That 2004 Second Circuit decision so states (at 301):

> "The state court decision ...found that 'The Thin Red Line', and certain other projects were owned by the plaintiff partnership, and did not belong to Geisler, Roberdeau, their affiliated corporations, or the Briarpatch general partners..."

During 2006, yet another New York Judgment set forth a step-by-step analysis of the governing New York limited partnership statutes under which the agreements, screenplays, and other rights were again found to be owned by the Partnership and not by RG/JR; RG/JR did not have authority to assign the agreements, screenplays, and related rights to Phoenix; and so those agreements, screenplays, and related rights could not have been acquired by Phoenix.

Despite those New York state court adjudications and the 2004 Second Circuit decision (that the agreements, screenplays, and other rights were and are owned by Petitioner Partnership and did not belong to RG/JR), the federal District Court subsequently rendered an erroneous 2007 ruling that Petitioner Partnership was estopped by those

state court adjudications from vindicating the Partnership's ownership of the agreements, screenplays, and other rights against Phoenix. On appeal, the Second Circuit Court of Appeals did not adopt those erroneous District Court estoppel rulings.

Instead, the Second Circuit's 2009 Decision affirmed denial of Petitioner Partnership's ownership of the agreements, screenplays, and other rights on erroneous grounds that defendant Phoenix was a "bona fide purchaser for value" of that property under New York state law – although that was contrary to New York statutes and the prior New York adjudications; no such affirmative defense had been pleaded by Phoenix; no such defense had been found by the District Court; the District Court findings contravened or did not support the elements required for such a defense; and thus no such defense had been so briefed on appeal.

Under governing New York property law, Respondent Phoenix could not successfully invoke that "bona fide purchaser for value" defense as to the Partnership property, because (i) Phoenix purported to acquire a quitclaim from only RG/JR of only rights of RG/JR (and not Partnership) rights; (ii) Phoenix was unable to demonstrate lack of "constructive notice" or of "actual notice" of petitioners' rights (in light of Phoenix' knowledge of sufficient facts to constitute "constructive notice", and testimony of hostile witness Geisler and other evidence creating a genuine issue of material fact as to whether Phoenix also had "actual notice"); and (iii) Phoenix was also unable to prove it made payment in full to the

purported rights assignor, as it did not pay any monies to the Partnership or any then general partner of the Partnership (nor even comply with its own option 1996 Option Agreement to pay an at least $800,000 purchase price to BFC).

2. Summary of the Issues as to Which Writ of Ceriorari Is Sought.

Petitioners here seek review of an erroneous decision of the federal appellate court, as:

(a) The federal appellate court's *sua sponte* application of the state law affirmative defense/ doctrine of "bona fide purchaser for value" ignored and was contrary to governing state statutes [namely the NY limited partnership and business corporation statutes] and state court property ownership adjudications, which had found the purported assignors to Phoenix did not "own" and were not "duly authorized" to assign, and so purported assignee Phoenix did not acquire, the agreements, screenplays, and other property at issue, and that property instead "belongs to and is the property of" Petitioner Partnership.

Federal court failure to apply governing state limited partnership and dissolved corporation statutes and other state law resulted here in inconsistent adjudications - as the state courts applying those governing statutes found all the agreements, screenplays, and other property were and are owned by the Partnership and so not transferred to Phoenix, whereas the federal courts, although purporting to apply state law (but actually

ignoring the state statutes) instead subsequently ruled that property was not owned by the Partnership but had been transferred to Phoenix.

(b) The federal appellate court's adoption of the "bona fide purchaser for value" doctrine was improper as contrary to not only the prior state court adjudications, but also to (i) District Court findings that respondent Phoenix received only a quitclaim of only RG/JR (and not Petitioner Partnership) rights; (ii) evidence cited by the District Court showing respondents had at least "constructive notice" of petitioners' rights; and (iii) evidence cited by the District Court showing respondents had not made payment in full to the proper payee as required by applicable state law.

(c) Contrary to Rule 56 of the Federal Rules of Civil Procedure, the federal courts erroneously ruled that Petitioners had not raised a sufficient issue of material fact as to Phoenix's "actual notice" of the existence of Petitioners' rights, although Petitioners obtained deposition testimony from a hostile witness that he believes he delivered a copy of the Limited Partnership Agreement to Phoenix, and credibility of that witness and other evidence as to Phoenix' knowledge were sufficient to raise "genuine issues of material fact" required to be submitted to the jury.

(d) Contrary to fundamental principles of due process and applicable law, the federal appellate court did not conduct additional review for bias of, nor remove the case from, the District Court Judge, who without provocation had announced on the record that he wants petitioner's attorney "dead"

[the District Court having so announced on the record to petitioner's counsel "I would like you to drop dead ... That's what I would really like"], and defendants' counsel later stated on the record "I never heard a judge say such a thing, I couldn't believe it when I heard it. What can I tell you, ... when a judge says something like that?"

STATEMENT OF FACTS

1. The State Court Adjudications Found Petitioners Acquired, Were Vested with, and Own the Agreements, Screenplays, and Other Property at Issue.

A. Petitioner Limited Partnership.

Prior to 1994, Petitioner Rubin funded acquisition of and had an at least $750,000 investment in the agreements, screenplays, and related property for The Thin Red Line motion picture Project, through an oral partnership between Rubin and Geisler/Roberdeau. The property was held for that partnership in the name of Geisler/ Roberdeau's company BFC. [12a]

Effective as of January 1, 1994, the relationship was converted into a formal limited partnership – as Rubin and five Geisler/Roberdeau corporations (including BFC) signed a written Limited Partnership Agreement (the "LPA") by its terms governed by New York law; pursuant to the LPA, Rubin became sole limited partner of the Partnership; BFC and the other Geisler/Roberdeau corporations were named the general partners of the

Partnership and so no longer had any interest in specific partnership property [NY RLPA §121-701 provides that "a partner has no interest in specific partnership property"]; and thus, by operation of that NY RLPA as of the LPA's January 1, 1994 effective date, the Partnership had acquired, and thereafter was, at least beneficial owner of all agreements, screenplays, and other rights to The Thin Red Line and other Projects, including all rights previously held by BFC. [13a-18a, 80a].

New York limited partnership law [NY RLPA §121-402(i)] further provides that upon a corporate general partner's dissolution, that dissolved corporation automatically ceases to be, and is thereafter disqualified from serving as, a general partner. BFC was dissolved in 1993; so disqualified by statute from thereafter serving as a general partner; and thus had no authority to assign any partnership property or otherwise act for the Partnership. [18a, 82a-83a, 86a]

By 1997, all other corporate general partners of the Partnership also had been dissolved [8a]. In December 1998, sole remaining limited partner Rubin was designated winding up partner of the Partnership [13a-14a, 19a].

B. The 1999 State Court Adjudications of Petitioner Partnership's Ownership of the Property.

In December 1998, Petitioners (plaintiffs Partnership and its sole limited and designated winding up partner Rubin) commenced an action in

New York state court against faithless fiduciaries, Geisler and Roberdeau, who through their corporate affiliates had operated and been in control of the Partnership. After a five-day trial, the New York court found that faithless fiduciaries Geisler/ Roberdeau had committed breaches of fiduciary duty, fraud, fraudulent concealment, conversion, misappropriation, and other misconduct against Petitioners with respect to The Thin Red Line Project and in diverting for themselves through their newly-formed affiliate GRI all $1.5 million paid by Phoenix in connection therewith [26a-29a].

The New York court then issued its October 1999 Judgment, which defined the "Projects" to include The Thin Red Line Project [80a]; declared all right, title, and interest acquired by Geisler/ Roberdeau and their affiliates in the Projects (and thus The Thin Red Line Project) was vested in the Partnership [80a]; ordered Geisler/Roberdeau to deliver to Petitioners all agreements, screenplays, stage plays, and other documents relating to The Thin Red Line Project "since they belong to and are the property of the Partnership" [82a-83a]; and enjoined Geisler/Roberdeau and their affiliates from holding themselves out as having any right, title, or interest in The Thin Red Line Project "as all such rights, title, and interest are vested in and belong to the Partnership" [82a].

That July 1999 Decision and October 1999 Judgment of the New York court were promptly recorded in the United States Copyright Office [21a, 79a].

C. The Second Circuit's 2004 Decision Acknowledged Those State Court Adjudications That *The Thin Red Line* Project Belongs to Petitioner Partnership.

After receipt of that July 1999 Decision as to the Partnership's ownership of all the agreements, screenplays, and other rights, the Partnership brought suit in New York state court against GRI, Phoenix, and Phoenix's principal Medavoy for (among other things) a declaration that those agreements, screenplays, and other rights had not been validly assigned by RG/JR [Geisler, Roberdeau, GRI, and their dissolved corporation BFC] to Phoenix. Phoenix removed that suit to federal court. The June 2004 Decision of the Second Circuit Court of Appeals therein ruled [*supra*, 373 F.3d at 301, J. Cardomone]:

> "The state court decision dated July 12, 1999 found that 'The Thin Red Line', and certain other projects were owned by the plaintiff partnership and did not belong to Geisler, Roberdeau, their affiliated corporations, or the Briarpatch general partners [such as BFC]."

D. The State Court's 2006 Judgment Further Confirmed Petitioner Partnership's Ownership of the Property.

During 2006, another New York state judge issued against Geisler and his affiliates yet another judgment, which applying a step-by-step analysis under governing New York limited partnership statutes, again found that the agreements,

screenplays, and other rights to The Thin Red Line Project "belong to and are the property of the Partnership". That New York state judgment explained as follows [22a, 86a]:

> "As this Court has previously adjudicated, The Thin Red Line project was acquired and became owned by the Partnership as of January 1, 1994 ... Neither Geisler, nor Roberdeau, nor Geisler Roberdeau, Inc. was ever a partner of the Partnership ... Briarpatch Film Corp. had been dissolved prior to 1994 ...; upon its dissolution ceased to be a general partner of the Partnership ... [NY RLPA §121-402(i)]; and so by 1994 had ceased to be a general partner of the Partnership."

The 2006 New York Judgment again found that, because none of RG/JR (Geisler, Roberdeau, GRI, or dissolved corporation BFC) was a partner of the Partnership, none of them could have assigned, or did assign, any agreements, screenplays, or other rights to Phoenix:

> "... non-partners Geisler, Roberdeau, Geisler Roberdeau, Inc., and Briarpatch Film Corp. entered into an Option Agreement with Phoenix Pictures, Inc. dated as of April 1, 1996 pursuant to which they purported to grant Phoenix Pictures, Inc. an option to purchase a quitclaim of their rights (if any) in The Thin Red Line screenplay for $800,000 ... As neither Geisler, Roberdeau, Geisler Roberdeau, Inc. and Briarpatch Film Corp. was a general partner of the Partnership, that

> Option Agreement did not grant, and none of them (neither Geisler, Roberdeau, Geisler Roberdeau, Inc., nor Briarpatch Film Corp.) assigned to Phoenix Pictures, Inc., any of the screenplays or agreements or other rights of the Partnership (whether for The Thin Red Line Project or otherwise)." [22a, 86a-87a]

That New York Judgment then reiterated The Thin Red Line "screenplays, ... agreements, ... and other documents ... belong to and are the property of the Partnership." [22a, 87a]

That 2006 New York Judgment was also promptly recorded in the United States Copyright Office [21a, 84a].

2. Under Respondent Phoenix's 1996 Option Agreement with RG/JR, Respondent Phoenix Purported to Acquire Only an Option for a Quitclaim of RG/JR (and Not Partnership) Rights and Only if Phoenix Paid the Entire $800,000 Purchase Price to BFC.

More than two years after the January 1, 1994 LPA effective date (as of which The Thin Red Line had been acquired by the Partnership under governing New York limited partnership statutes), Phoenix drafted and entered into an Option Agreement dated 1996 with RG/JR [non-partners Geisler, Roberdeau, GRI, and dissolved corporation BFC]. In that 1996 Option Agreement, RG/JR granted Phoenix an option to acquire only a quitclaim of only RG/JR (but not Partnership) rights and only upon payment to BFC of an $800,000

purchase price for the quitclaimed rights [19a-20a]. That Option Agreement (§2) stated the option was only:

> "to purchase the following rights ... any and all screenplays or scripts based thereon at every stage thereof (*to the extent such screenplays and/or scripts are owned ... by all or any of RG/JR*)." [emphasis added]

At deposition, Phoenix' draftsman/general counsel testified, and so admitted, as follows:

> "Q. Now, this says 'to the extent such screenplay and/or scripts are owned.' To the extent they weren't owned by RG/JR, what was the affect on this agreement?
> A. ... Basically it's quit claim language. It is saying you are giving us what you have."

Moreover, in that Option Agreement, Phoenix also agreed that to exercise the option, it must pay to BFC the full $800,000 Purchase Price [§3(c), "The 'Purchase Price' shall be $800,000 payable to [BFC]". Phoenix's draftsman/general counsel so testified:

> "Q. Why did you care [that the rights payments be made to BFC]?
> A. If we pay Geisler and Roberdeau and they don't own the rights, we don't get the rights."

But, in contravention of the terms of its own 1996 Option Agreement, Phoenix did not make any payment to BFC; instead Phoenix made all payments to GRI [20a-21a] which was never in the

chain of title and never a partner of the Partnership [10a]; and thus, as Phoenix's draftsman/ general counsel admitted, Phoenix would "not get the rights".

3. Respondent Phoenix's At Least Constructive Notice of Petitioners' Rights in the Project.

In addition to the quitclaim language and to BFC's dissolution by the New York Secretary of State being a matter of public knowledge, a series of other inherently suspicious circumstances would also have put a reasonable person on notice to conduct further inquiry as to, and so provided Phoenix constructive notice of, petitioner's rights in the agreements, screenplays, and other Thin Red Line property - including that (i), prior to entry into the 1996 Option Agreement, Medavoy/Phoenix had been interviewed by the press as to, and knew of, Geisler's arrest for "grand larceny" and "theft"; (ii) Medavoy/Phoenix also admitted knowing Geisler/ Roberdeau were "misrepresenting their involvement in The Thin Red Line" and were "charlatans", "con" men, "dishonorable", and "totally unreliable"; and (iii) Medavoy/Phoenix further admitted knowing that Geisler/Roberdeau and BFC were in financial distress [62a-63a].

Moreover, at deposition Geisler testified he had advised Phoenix/Medavoy that Rubin had funded the Project, and he [Geisler] believes he even provided Phoenix a copy of the Partnership's Limited Partnership Agreement [4a].

Unfortunately, the Second Circuit ignored that, in light of those suspicious circumstances, Phoenix/Medavoy were required by New York law to conduct further investigation of ownership of the agreements, screenplays, and other rights; but did not conduct such additional investigation; and so were on "constructive notice" of the facts which they would have discovered if they had conducted such investigation.

4. The District Court's Announcement That It Wanted Plaintiffs Partnership/Rubin's Counsel "Dead".

During the District Court proceedings, the District Court made an unprovoked statement that it wanted petitioners' counsel "dead" – announcing on the record to petitioner's counsel "I would like you to drop dead ... That's what I would really like". Respondents Phoenix/Medavoy's counsel, who had been present at that hearing, declared several years later on the record:

> "I never heard a judge say such a thing. I couldn't believe it when I heard it. What can I tell you, ... when a judge says something like that?"

Yet, in the Second Circuit's review of the District Court decision, the Second Circuit conducted no further inquiry as to, and did not question or weigh the bias inherent in, the District Court's statement that it wanted petitioner's counsel "dead".

REASONS FOR GRANTING THE WRIT

QUESTION 1. THE FEDERAL APPELLATE COURT ERRED BY COMPLETELY IGNORING GOVERNING STATE LIMITED PARTNERSHIP AND CORPORATION STATUTES AND PRIOR STATE COURT ADJUDICATIONS WHICH, CONSTRUING THOSE STATUTES, FOUND THAT THE AGREEMENTS, SCREENPLAYS, AND RELATED PROPERTY AT ISSUE "BELONG TO", AND ARE "OWNED BY","PROPERTY OF", AND VESTED IN" PETITIONER PARTNERSHIP AND SO CANNOT HAVE BEEN ASSIGNED TO RESPONDENT PHOENIX.

Deference to state statutes and state court adjudications is mandated by (among other things) 28 U.S.C. §1738 which provides that:

> "The Acts of the legislature of any State ... [and] the records and judicial proceedings of any court of any such State ... shall have the same full faith and credit in every court within the United States ... as they have by law or usage in the courts of such State ... from which they are taken".

At issue here is the deference so owed by federal courts to state property statutes and state court adjudications governing (among other things) ownership and transfer of agreements and other property under state law; the power and authority of state-created entities (such as limited partnerships and dissolved corporations) to own and transfer agreements and other property under state law; and, in particular, the power and authority of such state-

created entities (Petitioner New York limited Partnership and dissolved New York corporation BFC) to own and authority to transfer their property.

Because agreements are not subject to "copyright", the assignment of agreements is not governed by the Copyright Act [17 U.S.C. §1 et seq.]. Ownership of and authority to transfer those agreements is governed by state (here New York) law.

Likewise, although screenplays may or may not be copyrighted, nonetheless ownership and transfer of those screenplays is governed by state law (whether by laws of gift, descent and distribution, divorce, sale, or otherwise), including state law restrictions governing purported assignor's authority to assign (whether laws restricting transfer by minors, incompetents, or state-created entities such as limited partnerships or dissolved corporations). Similarly, even in federal court, state law governs construction of contracts, such as contractual restrictions on, and authority to transfer, property ownership. *National Broadcasting Co., Inc. v. Copyright Royalty Trib.*, 848 F.2d 1289, 1295 (D.C. Cir. 1988), citing *T.B. Harms Co. v. Eliscu*, 339 F.2d 823, 828 (2nd Cir. 1964), cert. den. 381 U.S. 915, 85 S. Ct. 1534, 14 L. Ed. 2d 435 (1965). Otherwise, federal courts would generate a body of law inconsistent with, and create constitutional issues as to failure to follow, underlying state statutes and state law principles for construction of contracts, and operation and dissolution of, and authority to transfer property by state-created entities (such as

petitioner New York limited Partnership, or dissolved New York corporation BFC).

Federal court disregard of those state statutes has led to the inconsistent and untenable results at issue here - in which state courts construing their state statutes found the property could not have been and was not assigned by RG/JR to Phoenix, but rather was owned by the Partnership; whereas the federal court (purportedly applying state law, but actually ignoring the governing state statutes) later found that same property was assigned by RG/JR to Phoenix, and so not owned by the Partnership.

It is undisputed that prior to 1993, Rubin provided at least $750,000 of funds to acquire the motion picture rights and for development of the screenplay of The Thin Red Line Project pursuant to his then oral partnership with Geisler/Roberdeau; the screenplay and other rights were held in the name of BFC, their New York corporation, as nominee for that oral partnership; but that oral partnership was converted into the limited Partnership, effective as of January 1, 1994, by written Limited Partnership Agreement ("LPA") signed by Rubin (sole limited partner) and BFC (a named general partner); and that LPA states it is governed by New York law [13a-19a]. Because the Partnership is a New York limited partnership, its ownership of, and the power and authority to transfer, its agreements, screenplays, and other assets is governed by the NY RLPA.

Under NY RLPA §121-701, "a partner has no interest in specific partnership property". Thus, as

of the January 1, 1994 LPA effective date, BFC automatically ceased to have any interest in Partnership property. See *Goldman Sachs & Co. v. Michael*, 113 A.D. 2d 326, 496 NYS 2d 427 (1985) (general partner does not have a direct ownership interest in property of the limited partnership). Likewise, case law confirms that a copyright is automatically transferred by operation of law upon an entity's conversion into a successor entity, *Telecom Technical Services, Inc. v. Rolm, Inc.*, 388 F.3d 820, 829 (11th Cir. 2004) (conversion of partnership into a successor entity held to transfer copyrights to that successor entity).

Moreover, New York applies the traditional rule that a dissolved corporation has no power or authority to act for or transfer assets of another [except to transfer property held by it for a beneficial owner (such as the Partnership) to that owner, or as a court directs]. For instance:

> (i) under New York statutes governing dissolved New York corporation BFC, a dissolved corporation's powers are limited to "winding up its affairs" [NY BCL §1005(a)], and not for the affairs of anyone else (such as the Partnership). See *Noise in the Attic Productions, Inc. v. London Records*, 10 A.D. 3d 303, 782 NYS 2d 1 (2004); and
>
> (ii) pursuant to NY RLPA §121-402(i), a dissolved corporation automatically ceases to be, and is disqualified from thereafter serving as, a general partner of a limited partnership, and so BFC (dissolved in 1993 and never

> reinstated) had by 1996 ceased to be, and was disqualified from serving as, a general partner of the Partnership.

Thus, under the governing New York statutes [NY RLPA §121-402(i) and NY BCL §1005(a)], dissolved corporation BFC had no right or authority during or after 1996 to transfer Partnership property to Phoenix [22a, 86a-87a].

That same analysis also governs transfer of copyrights and copyrighted material under the United States Copyright Act – as the Copyright Act [17 U.S.C. §204] permits property to be transferred only by (i) by operation of law, (ii) the "owner", or (iii) "such owner's duly authorized agent".

Upon entry into and signature of the Limited Partnership Agreement, ownership of the screenplays and other rights had been transferred by operation of law [NY RLPA §121-701] to the Partnership [*Telecom Technical Services, Inc. v. Rolm,* Inc., *supra*]; that transfer was confirmed by subsequent writings of and testimony of Geisler [*Eden Toys, Inc. v. Florelee Undergarment Co., Inc.*, 697 F.2d 27, 36 (2nd Cir. 1982) (where parties to transfer agree that transfer has been made, that transfer is binding against purported infringer); and, in any event, that transfer was confirmed by the New York adjudications filed in and recorded with the United States Copyright Office [*Taylor Corp. v. Four Season Greeting, LLC*, 403 F.3d 958, 964 (8th Cir. 2005)] (court order constituted a copyright transfer "by operation of law" and vested transferee

with the copyright ownership) [21a-22a, 79a-83a, 84a-87a].

Since none of RG/JR was the owner of the Partnership's interest and none of them was a partner of the Partnership (BFC having been dissolved by 1994 and so disqualified by statute from serving as a partner), none of them had authority to, and so none of them could, transfer the Partnership's interest in the agreements, screenplays, and other rights. Indeed, they did not even purport to transfer any interest of the Partnership, since each of RG/JR only purported to quitclaim its own (and not the Partnership's) interest [19a-20a]. Thus, that quitclaim by each of RG/JR of its own (but not the Partnership) interest was little better than a proverbial quitclaim of RG/JR's interest in the Brooklyn Bridge.

Even the District Court concurred that the RG/JR quitclaim did not assign any Partnership rights. Rather, the District Court observed that under governing law, a quitclaim only assigns the assignor's own interest, and not the interest of anyone else [52a, citing 43A N.Y. Jur. 2d Deeds, §228 (2006), and so explicitly found [19a-20a]:

> "The option in the [1996 Option] Agreement was only for a 'quitclaim of rights of RG/JR and did not purport to grant any rights of Briarpatch [Petitioner Partnership], which is not a party to the Agreement nor referred to by name".

In short, the New York state courts, construing the governing New York state limited partnership and corporation dissolution statutes, found RG/JR did not own, could not transfer to Phoenix, and so the Partnership continues to own, the agreements, screenplays, and related rights. On the other hand, the Second Circuit, purportedly construing New York law (but actually ignoring the state statutes and disregarding the state court adjudications and prior District Court findings) instead found RG/JR Phoenix transferred to Phoenix and so Phoenix (and not the Partnership) owns those same agreements, screenplays, and related rights.

Accordingly, the critical issue for this United States Supreme Court is whether federal courts may so ignore state statutes governing ownership of and authority to transfer property of a state-created entity (such as a limited partnership or a dissolved corporation) and prior state decisions construing those statutes, particularly where (as here) the state courts applying those state statutes have found in the litigation between petitioner and its faithless fiduciaries, that the property was owned by Petitioner limited Partnership and that fiduciaries did not own and did not have authority to assign that property to Respondents.

QUESTION 2. THE FEDERAL APPELLATE COURT ERRED IN SUA SPONTE APPLYING AN AFFIRMATIVE DEFENSE/DOCTRINE ("BONA FIDE PURCHASER FOR VALUE") NOT FOUND BY, AND CONTRARY TO FINDINGS OF, THE DISTRICT COURT

Summary judgment is authorized only insofar as moving party is entitled to judgment as a matter of law, where the truth is clear and no general issue remains for trial - the purpose of the rule being not to cut litigants off from their right of trial by jury if they have issues to try. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 468, 82 S. Ct. 486, 7 L.Ed. 2d 458 (1962).

An appellate court is barred from making any findings of fact, as the findings must be made at the district court level. *Kelley v. Everglades Drainage Dist.*, 319 U.S. 415, 421-422, 63 S. Ct. 1141, 87 L.Ed. 1485 (1943) (petition for writ of certiorari granted, judgment vacated, and case remanded where conclusions not supported by required findings); *Hatahley v. U.S.*, 351 U.S. 173, 182, 76 S. Ct. 745, 100 L. Ed. 1065 (1956) (appellate decision reversed where not supported by required findings in the record); *Anderson v. Bessemer City*, 470 U.S. 564, 573, 105 S. Ct. 1504, 1511, 84 L.Ed. 2d 518 (1985) (fact finding by appellate court not permitted).

Here, the state court adjudications, each recorded in the U.S. Copyright Office, clearly found the screenplays, agreements, and other rights were "vested in", "property of", "belong to", and "owned by" the Partnership [21a-22a, 82-83a, 87a]. Indeed, the Second Circuit's 2004 Decision (*supra*, 373 F.3d at 301), acknowledged that the state court had "found that The Thin Red Line, and certain other Projects were owned by the plaintiff Partnership" and "did not belong to" RG/JR.

Later, contrary to those state court adjudications and ignoring the Second Circuit's 2004 decision, the District Court erroneously found plaintiffs' ownership claims somehow estopped by the state court adjudications. Petitioners appealed that estoppel decision; it was clear that the estoppel decision was without merit; and thus the Second Circuit never mentioned, and so abandoned, application of the estoppel doctrine.

Instead, the Second Circuit erroneously grounded its 2009 Decision on the New York state law doctrine of "bona fide purchaser for value".

A. Under Governing State Property Law, the Quitclaim of RG/JR Rights Did Not Assign the Partnership's Rights.

As the District Court acknowledged, a quitclaim only assigns the assignor's own interest, and not the interest of anyone else [52a, citing 43A N.Y. Jur. 2d Deeds, §228 (2006), "In modern practice, a quitclaim is used when a grantor intends to convey only such interest as he has as opposed to a grant of the fee or other estate"].

The District Court explicitly found [19a-20a]:

> "The option in the [1996 Option] Agreement was only for a 'quitclaim' of rights of RG/JR and did not purport to grant any rights of Briarpatch [Petitioner Partnership], which is not a party to the Agreement nor referred to by name".

That finding accords with prior New York courts' adjudications that the RG/JR quitclaim did not assign any interest of the Partnership [21a-22a, 80a-83a, 87a].

Thus, as a simple matter of governing New York property law, the assignment by RG/JR of only the interest of RG/JR cannot possibly have assigned to Phoenix, and so Phoenix cannot have acquired, any interest of the Partnership/Rubin (which did not sign, and were not included in, that assignment).

B. Under Governing State Property Law, an Assignee Who Fails to Investigate Suspicious Circumstances Is Charged with Constructive Notice of the Facts Which Would Have Been Discovered with Proper Investigation of Those Suspicious Circumstances, and So Cannot Be a "Bona Fide Purchaser"

Under applicable New York law, the "bona fide purchaser for value" doctrine does not apply unless purported purchaser is found to have purchased the property at issue in "good faith" and "for value". In turn, that "good faith" requirement is not satisfied where purported purchaser is:

> "chargeable with constructive notice of any fact which would have been disclosed by a reasonably diligent inquiry if circumstances are such as to indicate to a person of reasonable prudence and caution the necessity of making inquiry to ascertain the true facts and he or she avoids such inquiry".

Majer v. Schmidt, 169 A.D. 2d 501, 504-4, 564 NYS 2d 722 (1991), citing *Fidelity & Deposit Co. v. Queens County Trust Co.*, 226 N.Y. 225, 123 N.E. 370.

For instance, in *Kittredge v. Grannis*, 244 N.Y. 168, 155 N.E. 88 (1926) the court held that once bonds were shown to have been converted and sold to defendant, the burden was on defendant to show it had purchased in good faith; but that purported purchaser failed to show the required good faith as it had knowledge of facts suspicious to the mind of a prudent man (such as knowledge that the purported seller had a history of defrauding others and was in financial distress). Likewise, in *Majer v. Schimdt, supra*, the New York court found defendants had constructive notice of facts they would have discovered if they had inquired further, as they were already aware their co-defendant had committed numerous fraudulent and criminal acts, was in financial difficulty, and had given false information.

In the case at hand, the state courts found Geisler/Roberdeau and their affiliates converted the opportunities with respect to The Thin Red Line [80a]. Likewise, the federal District Court found GRI had converted from the Partnership all monies paid by Phoenix with respect to The Thin Red Line [77a].

As the District Court found, the option granted to Phoenix in the 1996 Option Agreement was only for a "quitclaim", and that quitclaim was for only GR/JR rights [19a-20a]. It was a matter of public record that BFC had been dissolved in 1993

by the New York Secretary of State and never reinstated [18a].

Respondents also admitted being aware of a series of other suspicious circumstances which would have required a person of reasonable prudence and caution to make inquiry to ascertain the true facts - including that Geisler had been arrested for "grand larceny" and theft; that Geisler and Roberdeau were "charlatans", "con" men, "misrepresenting their involvement in The Thin Red Line", "dishonorable" and "totally unreliable"; and that Geisler/Roberdeau and BFC were in financial distress [62a-63a]. For instance, in Respondent Medavoy's letter on Phoenix letterhead to the press, Respondents admitted that Geisler "had been arrested for larceny", was "in breach of a legal agreement"; "dishonorable", and "selling idiocy"; and so could not be trusted nor relied on. Respondents so wrote and admitted:

> "You knew that Geisler and Roberdeau were already in breach of a legal agreement. Why you would trust the word of people who have shown themselves to be dishonorable and one of whom was arrested for larceny is beyond me. ... In my view, if these two producers survive the film business, it is only because they have an uncanny ability to sell their idiocy to the naïve. You were conned."

At deposition, Geisler further testified that Phoenix/Medavoy were aware The Thin Red Line Project had been funded by plaintiff Rubin, and that he [Geisler] believes he provided to Phoenix/

Medavoy a copy of the Partnership's Limited Partnership Agreement [4a].

In light of those suspicious circumstances, Phoenix/Medavoy had a duty under governing New York law to investigate further. But, they failed to make any additional investigation of any of those suspicious circumstances; thus, as a matter of New York law, were on constructive notice of facts that would have discovered if those suspicious circumstances had been properly investigated; and so cannot be bona fide purchasers for value. Indeed, to hold otherwise would encourage purchasers in suspicious circumstances (where as here dealing with "con" men, whom they knew to have been previously arrested for larceny and engaged in misrepresentations and other misconduct) to not conduct a proper investigation as to, and so facilitate sale of, converted property.

Each state has an interest in so proscribing ownership and authority to sell property of a limited partnership or corporation organized under its statutes; likewise to discourage sale of converted property; and so to proscribe and discourage sale of property of a state law limited partnership or corporation by persons with a prior history of arrest, larceny, dishonesty, and other misconduct.

In light of those suspicious circumstances, respondents Phoenix/Medavoy's failure to investigate those suspicious circumstances, the District Court did not (and could not) find they had acted in "good faith" and without "constructive

notice", and thus a "bona fide purchaser" defense could not be sustained.

C. Under Governing State Property Law, the Proper Assignor Was Not Paid the Required $800,000 Purchase Price, and Thus Phoenix Cannot Have Been a "Bona Fide Purchaser for Value".

Under governing New York property law, a purchase is not "for value" unless assignor receives actual benefit equivalent to the consideration it is assigning. Where the payment is not made to assignor, but rather to another person so that the assignor does not receive the full benefit of that payment, the requisite "value" has not been received. See *Rubin v. Manufacturers Hanover Trust Co.,* 661 F.2d 979,992-993 (2nd Cir. 1981); *Bennet v. Rodman & English, Inc.*, 2 F.S. 355 (SDNY 1932) (payment not made to person to whom owed, but rather to an affiliate, was not in good faith and did not constitute fair consideration); *Kivort Steel, Inc. v. Liberty Leather Corp.*, 110 A.D. 2d 950, 487 NYS 2d 877 (1985).

The District Court observed that, under New York law, payment for partnership assets is required to be made to the partnership [63a-64a, referring to "the tenet of partnership law that consideration for partnership property must be paid to the partnership"]. However, no payment was made by Phoenix to the Partnership nor to any then partner of the Partnership [10a (fn. 1), 18a, 29a].

Nor did Phoenix even make payment as required under its 1996 Option Agreement. The Phoenix' draftsperson for that Option Agreement admitted that she had drafted that Option Agreement to require the $800,000 purchase price be paid to BFC, and payment of that $800,000 to anyone else would result in Phoenix not acquiring the rights. Phoenix' draftsperson/general counsel so admitted at deposition as follows:

> "Q. Why did you care [that the rights payments be made to BFC]?
> A. If we pay Geisler and Roberdeau and they don't own the rights, we don't get the rights."

Yet, in contravention of those explicit terms of its 1996 Option Agreement, Phoenix made no payment to BFC, but rather made all payments to GRI which was never in the chain of title and never a partner of the Partnership [18a, 29a]. The District Court confirmed that GRI converted all payments so made [77a]. The District Court also found that only $395,000 (and thus less than half the $800,000 purchase price) was ever transferred by GRI to BFC [20a-21a]. Accordingly, as even Phoenix's draftsman/general counsel admitted, Phoenix would "not get the rights".

Thus, the Second Circuit decision is contrary to findings of fact as to required elements of the state law defense of "bona fide purchaser for value"- because the district court found the RG/JR quitclaim deed did not purport to, and did not, assign Partnership rights; there is at least a genuine issue of material fact as to whether respondents had

"constructive notice"; and Phoenix had not paid the required purchase price to the proper payee.

The problem of appellate decisions so not based on findings of fact in the record was recently the subject of an important dissent in *U.S. v. Ziegler*, 497 F.3d 890, 902 (9th Cir. 2007) (objecting that majority decided issue which neither party argued and as to which the district court made no supporting findings). To restore uniformity among the circuits, and compliance with FRCP 56, this Court should reverse and vacate the Second Circuit's erroneous decision which was contrary to, and not supported by, required findings in the record.

QUESTION 3 – THE FEDERAL COURTS FURTHER ERRED IN FAILING TO FIND A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER RESPONDENT PHOENIX HAD ACTUAL NOTICE OF PETITIONERS' RIGHTS, AS HOSTILE WITNESS GEISLER TESTIFIED THAT HE BELIEVES HE DELIVERED THE LIMITED PARTNERSHIP AGREEMENT TO PHOENIX AND ISSUES OF WITNESS CREDIBILITY ARE REQUIRED TO BE LEFT TO THE JURY.

As described above, Phoenix cannot assert the "bona fide purchaser" for value doctrine unless it was found to have acted in good faith; so must show it had neither actual nor constructive notice of plaintiffs' rights; but, as also described above, failed to show it had no "constructive notice" in the circumstances.

In the case at hand, plaintiffs also obtained deposition evidence from Geisler, a classic hostile witness against whom plaintiffs has obtained judgments for more than $7 million [82a, 88a-89a]. At deposition, Geisler swore that he believes (but was not absolutely certain) he delivered a copy of the Limited Partnership Agreement ("LPA"), and so put Phoenix on actual notice of plaintiffs' rights [4a]. His testimony was consistent with his delivery of the LPA to others.

On a motion for summary judgment, the court is not permitted to weigh disputed evidence, weigh credibility, or weigh inferences about knowledge from conflicting evidence. *Lawrence v. National Westminster Bank New Jersey*, 98 F.3d 61, 67 (3rd Cir. 1996); *Orthopedic & Sports Injury Clinic v. Wang Laboratories, Inc.*, 922 F.2d 220, 223 (5th Cir. 1991); *Hanover Ins. Co. v. American Engineering Co.*, 33 F.3d 727, 732 (6th Cir. 1994); *Johnson Farm Equipment Co. v. Cook*, 230 F.2d 119 , 122-123 (8th Cir. 1956); *Neely v. St. Paul Fire and Marine Ins. Co.*, 584 F.2d 341, 344 (9th Cir. 1978). Thus, the Second Circuit was not permitted to rule on credibility of Geisler's testimony as to his delivery of the LPA to Phoenix/Medavoy.

Nonetheless, the Second Circuit erroneously ruled that Geisler testimony (as to Geisler's belief he had delivered the LPA to Phoenix) was not sufficient to create an issue of material fact as to whether Phoenix received a copy of the LPA [4a]. In so ruling, it invaded the province of the jury – Geisler having also delivered the LPA to others, and the testimony that Geisler believes he delivered the LPA

to Phoenix being sufficient to create a material fact for the jury to decide whether or not he did so deliver to Phoenix, and thereby put Phoenix on notice of the terms of, the LPA.

That genuine issue of material fact is yet another reason Respondents' Rule 56 motion for summary judgment should have been denied.

QUESTION 4. THE FEDERAL APPELLATE COURT ERRED IN FAILING TO REVIEW THE DISTRICT COURT FINDINGS AND DECISION WITH GREATER SCRUTINY IN LIGHT OF THE DISTRICT COURT'S PRIOR UNPROVOKED STATEMENT ON THE RECORD THAT IT WANTED PETITIONERS' ATTORNEY "DEAD".

In the case at hand, the District Court Judge, without provocation, announced on the record to plaintiffs' [petitioners'] counsel that he wanted plaintiffs' counsel "dead" – so announcing to plaintiffs' counsel "I would like you to drop dead ... That's what I would really like".

Respondents' counsel, who had been present at that hearing at which the District Court made those statements, several years later declared on the record with respect to those District Court statements:

> "I never heard a judge say such a thing. I couldn't believe it when I heard it. What can I tell you, ... when a judge says something like that?"

On the one hand, due process includes a right to hearing before an unbiased court. *Caperton v. A.T. Massey Coal Company, Inc.*, 556 U.S. _ (No. 08-22, June 8, 2009) citing *Liteky v. United States*, 510 U.S. 540, 558 (1994) (Kennedy, J. concurring in judgment) ("[U]nder [28 US.C.] §455(a) a judge should be disqualified ... if it appears that he or she harbors an aversion, hostility, or disposition of a kind that a fair-minded person could not set aside when judging the dispute"). *U.S. v. Whitman*, 209 F.3d 619, 624, 626 (6th Cir. 2000) (appellate court transferred case to new district court judge in light of prior judge's harangue against party's attorney).

On the other hand, 28 U.S.C. §455(b)(1) requires a judge to "disqualify himself ... where he has a personal bias or prejudice concerning a party", but does not explicitly require disqualification for bias against a party's attorney. Thus, a District Court Judge may not be required to recuse himself even though stating on the record he wants a party's counsel "dead".

Irrespective of disqualification, fundamental due process requires that appellate courts deal with district court bias or prejudice which, although not so pronounced as to require automatic disqualification, nonetheless demonstrably exists – as here, where the District Court made an unprovoked statement that it wants Petitioners' counsel "dead" and even Respondents' counsel later declared on the record "I never heard a judge say such a thing. I couldn't believe it when I heard it."

On appeal, Petitioners brought to the attention of the Second Circuit Court of Appeals not only the District Court Judge's statement that he wanted petitioners' counsel "dead", but also the declaration of Respondents counsel ("I never heard a judge say such a thing. I couldn't believe it when I heard it").

Having been made aware of that District Court statement, the appellate court should have acknowledged its obligation to give greater scrutiny than might otherwise be required to the District Court's findings and conclusions. But in the case at hand, the Second Circuit Court of Appeals did not acknowledge any error or bias inherent in the District Court's statement; by its silence effectively condoned the District Court's improper statement; and further erred in failing to review the District Court's findings and conclusions with greater scrutiny in light of the inherent bias implicit in the District Court's improper statement.

Thus, this Supreme Court should consider the additional degree of review required to be given on appeal to a federal District Court's findings and conclusions, when the District Court has made statements clearly reflecting bias, as the District Court stated it wanted Petitioners' counsel "dead" and which were so extreme that even Respondents counsel later admitted "I never heard a judge say such a thing. I couldn't believe it when I heard it."

CONCLUSION

Petitioners submit that the Second Circuit erred in the following respects:

1. In ignoring state limited partnership and corporation statutes and adjudications governing ownership of and authority to transfer the agreements, screenplays, and other property at issue, resulting in federal court decisions inconsistent with and contrary to those state statutes and prior state court adjudications as to ownership and authority to transfer that property.

2. In deciding an appeal on the basis of a doctrine/affirmative defense not found in the District Court opinion and required elements of which were contrary to or not supported by District Court findings. .

3. In failing to find the statement of a hostile witness, that he believes he delivered a key document to defendants, creates a genuine issue of material fact as to whether defendants received and had actual notice of that document, and thus whether there is a genuine issue of material fact that should have been submitted to the jury.

4. In failing to apply a greater standard of review to findings and conclusions against plaintiffs of a District Court Judge who made an unprovoked statement on the record that he wants plaintiffs' counsel "dead", and which was so extreme that defendants' counsel stated "I never heard a judge say such a thing. I couldn't believe it when I heard it."

Therefore, Petitioners respectfully request that this Court grant this petition for writ of certiorari and reverse and/or vacate the decision of the Second Circuit Court of Appeals.

Respectfully submitted,

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Counsel for Petitioners, Briarpatch Limited, L.P. and Gerard F. Rubin

APPENDIX

APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FILED
MARCH 2, 2009
CATHERINE O'HAGAN WOLFE, CLERK
U.S. COURT OF APPEALS

NO. 07-5536-CV

BRIARPATCH LIMITED LP. And GERARD F. RUBIN,
Plaintiffs-Appellants
v.
PHOENIX PICTURES, INC. and MORRIS "MIKE" MEDAVOY,
Defendants-Appelles,
GEISLER-ROBERDEAU, INC.,
Defendant

Present:
HON. AMALYA L. KEARSE
HON. ROBERT A. KATZMANN,
Circuit Judges
HON. JOSEPH F. BIANCO,[1]
District Judge

Appeal from the United States District Court for the Southern District of New York (Sweet, J.).

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[1] The Honorable Joseph F. Bianco, of the United States District Court for the Eastern District of New York, sitting by designation.

ON CONSIDERATION WHEREOF, it is hereby ORDERED, ADJUDGED, and DECREED that the judgment of the district court be and hereby is AFFIRMED in part and REMANDED for further proceedings.

The plaintiffs-appellants Briarpatch Limited LPL ("Briarpatch") and Gerard F. Rubin appeal from so much of the judgments of the United States District Court for the Southern District of New York (Sweet, J.) entered May 3, 2007 and November 13, 2007, as granted summary judgment in favor of defendants Phoenix Pictures, Inc. ("Phoenix") and Morris "Mike" Medavoy, denied plaintiffs' motions for summary judgment, and denied plaintiffs' requests for attorney's fees and costs against defaulting defendant Geisler Roberdeau, Inc. ("GRI"). We assume the parties' familiarity with the facts, procedural history, and specification of issues on appeal.

Plaintiffs' declaratory judgment and copyright infringement claims fail because Briarpatch Film Corp. ("BFC"), not plaintiffs, held legal title to the copyrights at issue. Plaintiffs' contention that BFC transferred legal title to Briarpatch is not supported by any writing in the record, and plaintiffs have not pointed to any operation of law by which title would have been transferred. *See* 17 US.C. §204(a) ("A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent").

Plaintiffs attempt to circumvent the fact of BFC's legal ownership of the copyrights by arguing that the Limited Partnership Agreement ("LPA") or a prior oral partnership agreement, gave Briarpatch an equitable interest of some sort in the copyrights. We need not decide, however, whether an equitable interest was created or what the terms of any such interest might be, because Phoenix took title to the copyrights free of such purported equitable interest. Under New York law, a recipient of property takes the property free of any equitable interest, such as would give rise to a constructive trust, when the recipient is a bona fide purchaser. See, *e.g. Simonds v. Simonds*, 380 N.E. 2d 189, 194 (N.Y. 1978). A bona fide purchaser is "one who took without notice that [the property] had been wrongfully obtained." *Majer v. Schmidt*, 564 NY.S. 2d 722, 725 (App. Div. 1991) (citing *Simonds*, 380 N.E. 2d 189). Phoenix purchased the copyrights for value, and plaintiffs have not adduced sufficient evidence from which a trier-of-fact could reasonably infer that Phoenix had knowledge that the actions of BFC, Robert Geisler, or John Roberdeau breached any duties to Briarpatch or Rubin. At most, the evidence that plaintiffs identify shows that defendants were aware of Rubin's existence and the fact that he had invested money with Geisler and Roberdeau for the purpose of developing the project to which the copyrights related. That knowledge, however, is not enough to allow a reasonable inference that defendants (1) were aware that Rubin had any specific relationship with BFC, Geisler or Roberdeau, and (2) were further aware of specific terms of such a relationship that BFC, Geisler and Roberdeau were breaching. Although plaintiffs

claim that Geisler's deposition testimony shows that defendants were given a copy of the LPA, plaintiffs grossly mischaracterize that testimony – Geisler actually said "I have the vaguest recollection, vaguest recollection -- No, I can't say this because it would be very significant and I don't know that I'm right. I think we gave – I think we gave- I think we gave Phoenix the limited partnership agreement with Rubin. I can't be sure. I just can't be sure ..." Such equivocal testimony is not enough to support an inference that defendants had knowledge of the existence or terms of the LPA.

Plaintiffs' claim that defendants aided and abetted a breach of fiduciary duty fails for the same reason – they have not adduced evidence sufficient to allow a trier-of-fact to reasonably infer that the defendants had "actual knowledge" of BFC, Geisler, and Roberdeau's breaches of their fiduciary duties to the plaintiffs, as required by New York law. *See, e.g., In re Sharp Int'l Corp.*, 403F3d 43, 49 (2nd Cir. 2005). Plaintiffs' evidence is insufficient to allow an inference that defendants had knowledge of the LPA and its terms, let alone an inference that defendants knew that BFC, Geisler, and Roberdeau were going to fail to comply with those terms. The claim of conspiracy to breach fiduciary duties fails as well, since it is merely duplicative of the aiding and abetting count. *See, e.g.. Kew Gardens Hills Apt. Owners, Inc. v. Horing Welikson & Rosen, P.C.*, 828 N.Y.S. 2d 98, 101 (App. Div. 2006); *Durante Bros. & Sons, Inc. v. Flushing Nat'l Bank*,, 755 F.2d 239, 251 (2nd Cir. 1985).

Because we affirm the district court's grant of summary judgment in favor of defendants on all claims, we also affirm the district court's denial of plaintiffs' motion for summary judgment on defendants' affirmative defenses as moot.

Finally, as to plaintiffs' appeal of the district court's denial of their motion for fees and costs as to defaulting defendant GRI, it does not appear that the district court articulated any reasons for the denial of that motion. Because the district court's reasons are not clear from the record, we cannot review its decision. Accordingly, we remand the case to the district court pursuant to the procedures set forth in *United States v. Jacobson*, 15 F.3d 19, 21-22 (2nd Cir. 1994), for the limited purpose of allowing the district court to explain its decision to deny plaintiffs' motion for attorney's fees and costs.[2]

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[2] Plaintiffs have requested that, should the case be remanded, it be remanded to a different district court judge However, as a basis for that request, plaintiffs identify only one remark made by the district court in 2001, well before the instant appeal, and, indeed, before a previous appeal. When deciding whether to reassign a case on remand, "we look to the following factors: (1) whether the original judgment would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness." *Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130, 142 (2nd Cir. 2007) (internal quotation marks omitted). Those factors do not weigh in favor of reassignment in this case, where the alleged "bias" is a single comment made over seven years ago and the remand is for the

For the foregoing reasons, the judgment of the district court is hereby AFFIRMED in part and the case is REMANDED. The mandate shall issue forthwith. The parties are to inform the Clerk of the Court by letter within twenty-one days of when the district court has issued its clarification on the motion for attorney's fees and costs. Following such notification, jurisdiction of this appeal automatically will be restored to this Court without need for either party to file a new notice of appeal. After jurisdiction is restored, this panel will resume its consideration of the portion of this case concerning the motion for attorneys' fees and costs.

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limited purpose of allowing the district court to explain its decision on the motion for attorney's fees and costs.

APPENDIX B
APRIL 2, 2007 DISTRICT COURT OPINION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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BRIARPATCH LIMITED, L.P. and
GERARD F. RUBIN,

Plaintiffs, 99 Civ. 9623

-against (RWS)-

GEISLER ROBERDEAU, INC.,
PHOENIX PICTURES, INC., and
MORRIS' MIKE' MEDAVOY,

Defendants

_____x

The plaintiffs Briarpatch Limited, L.P. ("Briarpatch") and Gerard F. Rubin ("Rubin") (collectively the "Plaintiffs") have moved for partial summary judgment under Rule 56, Fed. R. Civ. P., to dismiss the affirmative defenses in the answer of defendants Phoenix Pictures, Inc. ("Phoenix") and Morris "Mike" Medavoy ("Medavoy") (collectively the "Defendants") and for partial summary judgment to declare Briarpatch the owner of the "The Thin Red Line" screenplay and related rights. The Defendants have moved for summary judgment under Rule 56, Fed. R. Civ. P., to dismiss the Plaintiffs' First Amended Complaint ("FAC") in its entirety as to the Defendants. For the reasons set forth below, the Plaintiffs' motions are denied, and the Defendants' motion is granted.

The Parties

Rubin is a successful businessman with a degree with a major in accounting and finance from Spriing Hill College, Mobile, Alabama, and a Masters in Business Administration from New York University. He has been a corporate officer with Kaufman Holdings, Hatco, Jones Apparel, and Kenar Enterprises, Inc. Rubin has made investments in the entertainment business.

Briarpatch is a New York limited partnership formed as of January 1, 1994. Its sole limited partner was Rubin, and the general partners were Briarpatch Construction Corp., Briarpatch Film Corp., Briarpatch Releasing Corp., Briarpatch Theatre Corp., and Sansho Company, Inc. The general partners were owned and controlled by Geisler and Roberdeau. Of the five named general partners of the partnership, three (Briarpatch Film Corp. and two others) were dissolved by the New York Secretary of State prior to the partnership's January 1, 1994 effective date; the other two (Briarpatch Releasing Corp. and Sansho Company, Inc.) were dissolved by the Secretary of State in 1995 and 1997.

Phoenix is a Delaware corporation incorporated in 1995. It is engaged in the business of development, acquisition, production, and exploitation of feature motion pictures. Among its founders, shareholders, and officers are Medavoy and Arnold Messer ("Messer"). In January of 1997, Phoenix incorporated a wholly-owned, single-purpose company, Thin Red Line Productions, Inc. ("TRL Productions") in California, to serve as the

production entity for the production of "The Thin Red Line" motion picture.

Medavoy has had a career in the motion picture business as a casting director, and the head of production for United Artists. In 1978, he was one of the founders of Orion Pictures and continued with that organization until 1990. In 1990, Medavoy became chairman of TriStar Pictures, and in 1995, he started Phoenix. Medavoy has been involved with production of such motion pictures as "Rocky", "One Flew Over the Cuckoo's Nest," "Platoon,", "Amadeus," "The Terminator," "Philadelphia," "The People vs. Larry Flynt,", and "The Sixth Day." Of the films Medavoy has been involved with, sixteen have been nominated for Best Picture Oscars and seven have won.

Prior Proceedings.

The prior proceedings in this action and the litigation relating to Briarpatch in the federal courts were described in Briarpatch Limited, L.P. and Gerard F. Rubin v. Geisler Roberdeau, Inc., et al, No. 99 Civ. 9623 (RWS), 2002 WL 31426207 (S.D.N.Y. Oct. 30, 2002) (the "October 30, Opinion"), granting summary judgment to the Defendants.

That judgment was the subject of Briarpatch Limited LP., Gerarrd F. Rubin v. Phoenix Pictures, Inc., et al, 373 F.3d 296 (2nd Cir. 2004) (the "Court of Appeals Opinion"), which vacated the dismissal of the complaint, the grant of summary judgment in favor of the Defendants, and the dismissal of the

claims against Geisler Roberdeau, Inc. ("GRI"),[1] and affirmed the denial of remand to the state court and the dismissal of the unjust enrichment and declaratory judgment claims "for reasons different from those the district court relied upon." Id., at 309-10. The Court of Appeals Opinion concluded that dismissal of GRI was in error, that this Court has copyright jurisdiction over the unjust enrichment and declaratory judgment claims against Phoenix, and that it has power under 28 U.S.C.§1367(a) to hear the claims over which it lacks copyright jurisdiction if its exercises its jurisdiction under 28 U.S.C. §1367(c). Id., at 309. The Court of Appeals Opinion also barred this Court from relying on the October 30 Opinion unless it determines that the Plaintiffs' access to evidence was not hindered by the erroneous dismissal of GRI. Id.

The Court of Appeals mandate was filed on November 5, 2004. On November 1, 2005, the Court granted the Plaintiffs' motion to amend their complaint and listed certain state court actions and federal actions in which Briarpatch was involved. Briarpatch Ltd., L.P. & Gerard F. Rubin v. Geisler Roberdeau, Inc., et al, no. 99 Civ. 9623 (RWS), 2005 WL 2861604 (S.D.N.Y. Nov. 1, 2005) (the November 1 Opinion"). Given the docket entry of March 3, 2000, it was assumed that GRI was no longer a party and that further action by the Plaintiffs would be required to join GRI. Id., at *2.

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[1] GRI is a corporation incorporated in the State of New York in 1994 and dissolved by proclamation of the Secretary of State of New York, published on September 23, 1998. Geisler and Roberdeau are the sole shareholders, officers, and directors of GRI. GRI was never a partner in Briarpatch.

The First Amended Complaint ("FAC"), dated April 19, 2005, was served and entered on the docket on November 14, 2005. It alleges six causes of action: (1) conspiracy to breach fiduciary duty against all defendants (FAC ¶¶ 131-139); (2) aiding and abetting a breach of fiduciary duty against all defendants (FAC ¶¶140-147); (3) trover and conversion against GRI (FAC ¶¶148-151); (4) unjust enrichment against GRI (FAC ¶¶152-154); (5) declaratory judgment against Phoenix (FAC ¶¶155-167); and (6) copyright infringement against Phoenix (FAC ¶¶168-181). The primary difference between the FAC and the original complaint filed in this action is that the Fifth and Sixth Causes of Action have now been brought under federal copyright law, rather than as state law claims for declaratory judgment and unjust enrichment.

Discovery proceeded, and the instant motions were made and marked submitted after argument on September 20, 2006.

The Facts

The extensive factual submissions of the Plaintiffs have not altered the facts found in the October 30 Opinion which are adopted herein.[2]

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[2] The October 30 Opinion contained a typographical error as to the date of the recording of the option agreement which occurred on October 23, 1996, and the incorporation of Phoenix which occurred in 1995.

Additional facts are contained in the Plaintiffs' Rule 56.1 Statement, the Defendants' Rule 56.1 Statement, the Defendants' Supplemental Rule 56.1 Statement, the Plaintiffs' Response to Local Rule 56.1 Statement of Defendants, and the Counter rule 56.1 Statement of the Defendants, and are not in dispute except as noted.[3]

During the 1980's, Rubin met Geisler and Roberdeau and funded a stageplay they had developed. From January 1996 through September 1993, Rubin invested $6,250,000 with Geisler and Roberdeau. Of the $6,250,000, $750,000 was invested by Rubin specifically with respect to the development expenses incurred by Geisler and Roberdeau to acquire the right to produce a motion picture based on the novel "The Thin Red Line," including: (1) $325,000 for acquisition of the rights to the underlying James Jones novel; (2) $250,000 for Terrence Malick ("Malick") to write the draft screenplay; and (3) $31,250 for payment of Writers Guild of America ("WGA") fringes for Malick.

Briarpatch Film entered into the agreements for the underlying James Jones novel and the agreement with Malick for the screenplay, and acquired the Malick screenplay for the "Thin Red

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[3] Given the extended discovery conducted by the Plaintiffs, it is concluded that the Plaintiffs' access to evidence has not been hindered by the prior dismissal of GRI. Plaintiffs have indicated that they obtained "important" "new testimony and other evidence" "after reinstatement of Geisler Roberdeau, Inc. as a defendant and service of plaintiffs' First Amended Complaint ...." (Pls.' Reply Mem., Sept. 12, 2006 ("Pls.' Reply Mem."), 9-10.)

Line" project solely in its own name. Specifically, Briarpatch Film Acquired the motion picture derivative rights to the novel "The Thin Red Line" through a written contract dated May 1, 1989, with the estate of James Jones and a written contract dated April 1, 1990, with Philip Yordan. (Defs.' Exhs. 18 & 20). Briarpatch Film owned the Malick screenplay based upon the novel "The Thin Red Line" pursuant to a written contract dated January 1, 1989, with Malick. (Defs.' Ex. 22.) Evidence of Briarpatch Film's ownership of the "The Thin Red Line" motion picture rights was properly recorded in the Copyright Office in 1990 and 1992 (Defs' Exs. 19 & 21), and evidence of Briarpatch Film's ownership of the Malick screenplay was properly recorded in the Copyright Office in 1997 (Defs.' Ex. 25) (referred to collectively as the "TRL Motion Picture Rights"). According to the Defendants, additional motion picture derivative rights to that novel and screenplay were obtained directly by Phoenix after its acquisition of the TRL Motion Picture Rights from Briarpatch Film.

1. The Limited Partnership Agreement.

Prior to January 1, 1994, Rubin had not entered into any written agreements with respect to the $6,250,000 he had given to Geisler and Roberdeau during the prior seven years. In late 1993, Rubin decided that he would no longer invest any additional funds with Geisler and Roberdeau.

In March 1994, Rubin, Geisler and Roberdeau finally entered into a written limited partnership agreement (the "Limited Partnership Agreement").

The Limited Partnership Agreement was drafted by the law firm of Paul, Weiss, Rifkind, Wharton & Garrison LLP ("Paul Weiss"), counsel for Geisler and Roberdeau and their companies, and set forth their respective obligations and rights regarding Rubin's prior investment in various entertainment projects. Rubin was the sole limited partner. The only general partners were five corporations owned by Geisler and Roberdeau, including Briarpatch Film corp. ("Briarpatch Film"), Briarpatch Construction Corp., Briarpatch Theater Corp., Briarpatch Releasing Corp., and Sansho Company, Inc.

The recitals of the Limited Partnership Agreement stated as follows:

> WHEREAS, the parties heretofore have worked together to produce, develop and present certain entertainment-related projects (each a "Project" and, collectively, the "Projects"); and
>
> WHEREAS, the parties now desire to formalize the terms of their relationship and to operate their business as a limited partnership of which Briarpatch will be the sole general partner and Rubin will be the sole limited partner (the "Partnership").

(Pl.s.' Ex. 14 at 1.)

The first sentence of Section 2 of the limited Partnership Agreement stated:

> The parties hereto hereby form the Partnership to develop, produce and present the Projects and to exploit any and all other rights in the Projects.

(Id. ¶2.)

The Limited Partnership Agreement also contained the following terms:

> 3. Decisions; Contracts.
>
> 3.1. [General Partner] shall have the complete, exclusive and unqualified control of all aspects of the business of the Partnership, including over the development, production, presentation, distribution, exhibition, exploitation and other disposition of any Projects, directly or by any other party in all media throughout the world, in perpetuity, in accordance with such sales methods, policies, terms and conditions as [General Partner] in its sole business judgment may determine proper.
>
> 3.2. [General Partner] shall have the unrestricted right to sell or assign, and to pledge, mortgage or otherwise hypothecate, any Project, either in whole in part, without obtaining the consent of Rubin.
>
> 4. Rights; Copyright.
> 4.1. Rubin acknowledges and agrees that, except as expressly set forth in this Agreement, he does not and shall not have

> any right, title or interest of any kind whatsoever in or to any Project (including, without limitation, any copyrights or any income derived therefrom).
>
> 4.2. The copyrights in the Projects shall be registered in the name of [General Partner], or such party as [General Partner] in its sole business judgment may determine proper.

(Id. ¶¶ 3, 4)

Rubin read and understood these provisions and was represented by counsel at that time.

Rubin's investment was contributed to the Partnership. He had the contractual right to be reimbursed for the applicable project development expenses he financed from any "development expense reimbursements" received by any general partner with respect to any project, including "The Thin Red Line" ("TRL"). In addition, Rubin was to receive a percentage of all "distributable cash" derived from any of the projects, including TR. (Id. ¶¶6.2, 7.1, 7.2).

Geisler testified that, as of the January 1, 1994 effective date of the Limited Partnership agreement, the TRL became a "Project" of the Partnership. Whether Briarpatch became the beneficial owner of the TRL project is an issue of law.

Section 11 of the Limited Partnership Agreement provided:

> The parties agree that within ten business days of receipt by [General Partner] of a written request from Rubin, one or more of the Partners hereto (or their designee) shall purchase all of Rubin's right, title and interest hereunder with respect to any Project identified in such request for $10.

(Id. ¶11.)

The second sentence of Section 13 of the Limited Partnership Agreement stated:

> No party hereto shall have the right to assign this Agreement or any of its rights hereunder or herein without the prior written consent of the other parties; provided, however, that each party shall have the right to assign its right to receive revenues hereunder.

(Id. ¶13.).

Section 14 of the Limited Partnership Agreement stated:

> This contract is made in the State of New York and shall be construed in accordance with, and governed by, the laws of that state applicable to contracts made and performed entirely therein.

(Id. ¶14.)

Section 18.3 of the Limited Partnership Agreement stated:

> This Agreement constitutes the entire understanding between the parties hereto and replaces all prior understandings and agreements between the parties with respect to the Projects. It may not be modified except by a written instrument signed by all of the parties.

(Id. ¶18.3.)

Rubin never signed any written instrument modifying the Limited Partnership Agreement. No "written consent" was obtained from Rubin for any assignment of the Limited Partnership Agreement or any rights under or in the Limited Partnership Agreement. Rubin did not sell, and Geisler and Roberdeau's companies did not purchase, Rubin's interest in the TRL project under the Limited Partnership Agreement. Roberdeau sent Rubin an April 4, 1994 letter "re: Briarpatch Film/Theatre Corp." in which Roberdeau acknowledged "Under our Limited Partnership Agreement, it is my duty from time to time to report on the condition of our projects." (Pls.' Ex. 16.)

GRI did not become a general partner of the Limited Partnership Agreement.

Briarpatch Film was a New York corporation dissolved by the Secretary of State of New York by proclamation in March 1993. (FAC Ex. 4.)

In December 1998, Rubin, the sole limited and sole remaining partner of Briarpatch was designated the sole winding up partner and then filed a state court action on December 17, 1998, against Geisler and Roberdeau (the "original New York action").

2. The Phoenix TRL Acquisition Agreement.

Phoenix was established in 1995 and began negotiating with Geisler, Roberdeu, Briarpatch Film, and GRI (the "Geisler/Roberdeau Parties" or "RG/JR") with respect to the TRL Motion Picture Rights. The Geisler/Roberdeau Parties were represented by two law firms and one theatrical agency during these negotiations.

The negotiations between the Geisler/ Roberdeau Parties and Phoenix were concluded in August 1996 by an agreement dated as of April 1, 1996 (the "Phoenix TRL Acquisition Agreement"). The Phoenix TRL Acquisition Agreement granted Phoenix an option only to acquire rights from RG/JR and only "to the extent such screenplays and/or scripts are owned, controlled or developed by all or any of RG/JR." (Defs.' Ex. 2.) The Phoenix TRL Acquisition Agreement was drafted by Lindsey Bayman ("Bayman") who was then a vice president and the in-house counsel of Phoenix. Bayman testified that the phrase "to the extent such screenplays and/or scripts are owned ... by all or any of RG/JR,", as used in the Phoenix TRL Acquisition Agreement was "quitclaim language." (Pls.' Ex. 50 at 142:11-17.). The option in the Agreement was only for a "quitclaim" of rights of RG/JR and did not purport to grant any rights of Briarpatch, which is

not a party to the Agreement nor referred to by name.

Pursuant to the Phoenix TRL Acquisition Agreement, Phoenix agreed to pay $800,000 to acquire the TRL Motion Picture Rights and $600,000 for producer fees, and to forgive repayment of a $100,000 loan Medavoy had made pursuant to an earlier agreement with the Geisler/Roberdeau Parties. (Defs.' Ex. 2 at 2-4). Pursuant to the terms of the Phoenix/TRL Acquisition Agreement, Phoenix timely paid the "option fee/purchase price," as defined in that agreement, and acquired ownership of the TRL Motion Picture Rights, including the Malick screenplay. Phoenix further paid in full, on or about July 18, 1997, the fixed "producer fees" compensation as defined in that agreement. On October 23,1996, Phoenix recorded in the Copyright Office a copy of the Short Form Option Agreement, Exhibit A to the Phoenix TRL Acquisition Agreement, signed by Geisler and Roberdeau individually, GRI, and Briarpatch Film. (Defs.' Ex. 11.) The Short Form Option Agreement referred to the motion picture and other rights to the James Jones novel, TRL; to the 1989 agreement between the estate of Jones and Briarpatch Film; to the agreement dated April 1, 1990, between Yordan and Briarpatch Film; and to the Malick screenplays.

GRI was the entity that directly received payments from Phoenix in connection with Phoenix's acquisition of the TRL Motion Picture Rights and the production of the TRL movie. In August 1996, GRI transferred $200,000 of the $300,000 received from Phoenix to a Briarpatch Film account in London.

(Defs.' Ex. 35.) In June 1997, GRI also transferred $195,000 of the $277,000 it received from Phoenix to a Briarpatch Film account in London. (Defs.' Ex. 36.) According to the Plaintiffs, the payments by Phoenix made to GRI evidence a conspiracy with Geisler and Roberdeau to breach their fiduciary duty.

According to the Plaintiffs, Bayman testified that unless Phoenix paid to Briarpatch Film the purchase price under Section 2(c) of the Phoenix TRL Acquisition Agreement, Phoenix would not acquire the rights thereunder. The Defendants deny this. Plaintiffs also contend that the New York courts adjudicated that all agreements, screenplays, and other documents relating to the TRL project "belong to and are the property of the Partnership."[4] The Defendants deny this as well.

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[4] The adjudications so filed by the Plaintiffs with the Copyright Office include:

> (i) the July 12, 1999 Findings of Fact, Conclusions of Law, and Decision of the New York Supreme Court in the action entitled Briarpatch Limited, L.P. and Gerard F. Rubin v. Robert Geisler and John Roberdeau, Index No. 606156/98 (the "original New York action");
> (ii) the Order and Judgment entered and docketed October 14, 1999, in the original New York action on October 18, 1999, page 242; and
> (iii) the May 2006 Judgment and Order in the action entitled Briarpatch Limited, L.P. and Gerard F. Rubin v. D.M. Thomas, D.M. Thomas Ltd., Briarpatch Film Corp., Robert M. Geisler, Verner Simon, P.C., Paul W. Verner, and Night Hawk Limited, Index No. 603364/01 (the "2006 Judgment"), filed with the United States Copyright Office on June 8, 2006.

(Pls.' Ex.s 1.8, 1.9, 51.)

Some time prior to June 13, 1997, Rubin had knowledge that the Geisler/Roberdeau Parties had made an agreement with Phoenix with respect to the TRL Motion Picture Rights and that Phoenix intended to produce a motion picture based upon the exercise of those intangible rights from having read

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The 2006 Judgment corrected the Referee's February 2, 2006 Report to read as follows:

> "As this Court has previously adjudicated The Thin Red Line Project was acquired and became owned by the Partnership as of January 1, 1994. Neither Geisler, nor Roberdeau, nor Geisler Roberdeau, Inc. was ever a partner of the Partnership. Briarpatch Film Corp. had been dissolved prior to 1994; upon its dissolution ceased to be a general partner of the Partnership; and so by 1994 had ceased to be a general partner of the Partnership. Nonetheless, non-partners Geisler, Roberdeau, Geisler Roberdeau, Inc. and Briarpatch Film Corp. entered into an Option Agreement with Phoenix Pictures, Inc. dated as of April 1, 1996 pursuant to which they purported to grant Phoenix Pictures, Inc. an option to purchase a quitclaim of their rights (if any) in The Thin Red Line screenplay and Project for $800,000 and also arranged for themselves to be paid a purported producer fee of $600,000, plus deferred and contingent compensation, and expense reimbursements. As neither Geisler, Roberdeau, Geisler Roberdeau, Inc., nor Briarpatch Film Corp. was a general partner of the Partnership, that Option Agreement did not grant, and none of them (neither Geisler, Roberdeau, Geisler Roberdeau, Inc., nor Briarpatch Film Corp.) assigned to Phoenix Pictures, Inc., any of the screenplays or agreements or other rights of the Partnership (whether for The Thin Red Line Project) or otherwise); rather, as this Court adjudicated, those 'screenplays, ... agreements, ... and other documents ... belong to and are the property of the Partnership" ...

(P.s.' Ex. 51 (internal citations omitted).)

newspapers, magazines, and from his son, an actor living in Los Angeles.

On June 13, 1997, Howard Justvig of Becker Ross Stan DeStefano & Klein ("Justvig"), as counsel to Rubin, wrote to Geisler and Roberdeau's former attorney at Paul Weiss to seek an accounting of Briarpatch. (Pls.' Ex. 24.) Geisler received a June 16, 1997 letter from John P. Breglio ("Breglio") of Paul Weiss with the June 13, 1997 letter from Justvig attached. Justvig also sent to Geisler, and Geisler received, both an October 10, 1997, and January 23, 1998 letter "Re: Briarpatch Limited, L.P." requesting accountings. (Pls.' Ex.s 26 & 28.) Finally, Justvig sent Geisler and Roberdeau, and Geisler and Roberdeau received, an August 20, 1998 letter threatening legal action in the absence of an accounting. (Pls.' Ex. 30.)

Rubin was not provided an accounting for the period from January 1, 1994, through December 1998 with respect to the TRL project or Briarpatch. Through December 15, 1998, Geisler and Roberdeau did not disclose to Rubin that Geisler and Roberdeau or any of their affiliates had entered into any agreement with Phoenix and Medavoy, the terms of any such agreement, or the receipt of funds from Phoenix. On December 15, 1998, Rubin verified his complaint in the original New York action, which alleged that Geisler and Roberdeau had assigned the TRL Motion Picture Rights to Phoenix. (Pls.' Ex. 34.)

3. The Buyout Agreement

A dispute arose between the Geisler/ Roberdeau Parties and Phoenix regarding further personal services in connection with the development and production of TRL. As a result, the parties entered into an agreement dated July 18, 1997 (the "Buyout Agreement"), by which it was agreed that Geisler and Roberdeau would not render any further personal services in connection with the development and production of the TRL motion picture, and that Phoenix would immediately pay the balance of $430,000, plus certain expenses, owed to the Geisler/Roberdeau parties. (Pls.' Ex. 2.) Phoenix made these payments on July 18, 1997. In the Buyout Agreement, the Geisler/Roberdeau Parties acknowledged and agreed that Phoenix had paid the acquisition price and had acquired the TRL Motion Picture Rights as provided in the Phoenix TRL Acquisition Agreement. (Id.)

According to the Defendants, prior to July 18, 1997, neither Medavoy nor Phoenix nor any Phoenix employee or executive, ever knew of the existence of either Rubin or Briarpatch, nor of any fiduciary duties that might have been owed by Briarpatch Film, Geisler, Roberdeau, or anyone else to Rubin or Briarpatch. According to the Plaintiffs, Medavoy was told by Geisler that prior funding of the TRL project was done by a person who withdrew from the partnership.

According to the Defendants, neither Medavoy nor Phoenix, nor any employee or executive of Phoenix, has ever: (1) entered into any agreement with Briarpatch Film, Geisler, Roberdeau, or any of their affiliates or with any of them, to breach any

fiduciary duties as may have been owed by Briarpatch Film, Geisler, Roberdeau, their affiliates or any of them to Plaintiffs or either of them; (2) provided any assistance to Briarpatch Film, Geisler, Roberdeau, or their affiliates, or any of them, to breach any fiduciary duty that they may have owed at any time to Rubin or Briarpatch; nor (3) done or committed any overt act to assist Briarpatch Film, Geisler, Roberdeau, or their affiliates, or any of them, to breach any fiduciary duties they may have owed at any time to Rubin or Briarpatch.

Medavoy and Phoenix received, not later than September 1, 1998, a copy of the letters that Justvig had sent to Geisler and/or Roberdeau, including the October 10, 1997,[5] and the January 23 and August 20, 1998 letters. In September 1998, Geisler and Roberdeau's attorney, Thomas Selz of Frankfurt Garbus Klein & Selz ("Selz"), advised Phoenix and Medavoy in writing that Rubin was not owed any money and that Rubin's attorney acknowledged that Rubin's claims had nothing to do with Phoenix.

4. Production of the Motion Picture "The Thin Red Line"

Principal photography for the TRL motion picture commenced in Australia on or about June 23, 1997. Phoenix reviewed the chain of title regarding the TRL Motion Picture Rights as did Phoenix's outside counsel, the attorneys for City National

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[5] While Plaintiffs' Rule 56.1 Statement uses the date of October 24, it is presumed that Plaintiffs are referring to the October 10, 2007 letter.

Bank, and attorneys for Fox. These reviews did not disclose any interest, or any claimed interest, by Plaintiffs in the TRL Motion Picture Rights.

TRL was initially released in theaters in the United States in December 1998 pursuant to an agreement between Phoenix and Twentieth Century Fox Film Corporation ("Fox"). The copyright to the motion picture was recorded in December 1998. (Def.s' Ex. 24.) The motion picture "The Thin Red Line" received substantial critical acclaim and was nominated for seven Academy Awards, including Best Picture.

According to Defendants, the motion picture of the TRL was created by Phoenix with the consent of the former owners of the TRL Motion Picture Rights; neither Medavoy nor Phoenix violated or infringed any intangible right or interest owned by Rubin or Briarpatch by producing that film. The Plaintiffs deny this conclusion.

5. The Original New York Action

On December 18, 1998, Phoenix received a fax of the complaint and restraining order in the original New York action. After a five day trial in the action, the July 12, 1999 decision was entered. Plaintiffs recorded the decision in the United States Copyright Office during August 1999. (FAC Ex. 8.)

Rubin, in connection with matters relevant to this litigation, has been represented by an accountant John Daus, by attorney Art Chianese of

Zager, Fuches, Kauff & Needle, and by Justvig of Beeker Ross Stone DeStefano & Klein.

Rubin and Briarpatch obtained a $1,500,000 judgment against Geisler and Roberdeau in the original New York action, for, inter alia, breach of fiduciary duty. During the state court proceedings, Rubin obtained a temporary restraining order against Geisler/Roberdeau dated December 17, 1998. A five-day trial was held in May and June 1999, and the state court issued a thirty-one page Findings of Fact, Conclusions of Law, and Decision dated July 12, 1999, which held that Geisler and Roberdeau had breached their fiduciary duties to Briarpatch and Rubin and committed fraud, fraudulent concealment, conversion, misappropriation, and other misconduct.

The state court entered an order and judgment against Geisler and Roberdeau, which declared that TRL was one of the Projects of the partnership, adjudicated the rights of the partnership and Rubin in TRL and other Projects, and ordered Geisler and Roberdeau to immediately deliver to the partnership and Rubin "all screenplays, treatments, agreements, ... and other documents ... since they belong to and are the property of the Partnership." The order and judgment were entered by the County Clerk, New York County, on October 14, 1999.

The state court made findings of fact including the following:

38. By letter of their then counsel, Frankfurt Garbus Klein & Selz dated September 9, 1998, defendants represented to third party Phoenix Productions, Inc. that under the Partnership Agreement "Mr. Rubin's investment was reduced on a dollar-for-dollar basis by whatever income tax deductions he took as losses on his investment" and that "Mr. Rubin has in fact deducted all of his investments so that nothing further is owed to Mr. Rubin".

39. Those representations by or on behalf of defendants were false and were known [by] defendants to be false...

40. Those misrepresentations by or on behalf of defendants were made intentionally to conceal and prevent discovery of their misappropriation of the rights and remuneration of the Partnership and of Rubin.

...

45. On or about August 23 or 24, 1996, defendants Geisler and Robereau entered into an Agreement with Phoenix Pictures, Inc. dated as of April 1, 1996.

46. Pursuant to that April 1, 1996 Agreement, defendants agreed to sell to Phoenix Pictures all rights to The Thin Red Line for $800,000 and also arranged for themselves to be paid a purported producers fee of $600,000, plus deferred and contingent compensation, and expense reimbursements.

> 47. Phoenix Pictures did in fact pay defendants' company Geisler Roberdeau, Inc. that sum of $1,400,000 by check or wire transfer in 1996 and 1997 for The Thin Red Line (except that $100,000 of that $1,400,000 was withheld by Phoenix Pictures to offset the $100,000 April 1996 borrowing by defendants Geisler and Roberdeau from Phoenix Pictures).
>
> 48. In accordance with the instructions of defendants, all $1.5 million paid by Medavoy and by Phoenix [(] consisting of $100,000 paid by Medavoy and the $1,400,000 paid by Phoenix) with respect to The Thin Red Line was paid to, and deposited in bank accounts of, Geisler Roberdeau, Inc.

(FAC Ex. 8 at 7-9, ¶¶38-40 & 45-48.)

In the original New York action, the court made conclusions of law including the following:

> 6. Remuneration payable by defendants Geisler and Roberdeau and their affiliates to the Partnership specifically includes without limitation:
>
> (i) The $1,500,000 received from Michael Medavoy and his company Phoenix Pictures for The Thin Red Line (whether characterized as loans forgiven, payments for film rights, producer fees, or otherwise); ...

(Id. at 24, ¶6.)

The $1.5 million judgment in favor of Plaintiffs in the original New York action was based, in part, upon the New York court's finding of the fact that Briarpatch Film, Geisler, and Roberdeau had deceived Medavoy and Phoenix by advising Medavoy and Phoenix in September 1998 that Rubin was not entitled to be paid any monies with respect to the exploitation of the TRL Motion Picture Rights.

6. Malick

Malick, the director of the TRL, only recalled meeting Rubin at a 1992 party given by Geisler and Roberdeau at their home in Greenwich Village, New York. Malick had no recollection of any substantive conversations with Rubin at that time, including no recollection of any conversation regarding the proposed motion picture to be made based upon the TRL novel.

Although Malick was aware that Rubin, and other small investors, provided funds to Geisler and Roberdeau to help finance their activities in developing the TRL motion picture project. Malick knew very little about Geisler and Roberdeau's relationship with Rubin and he did not know of any details of Rubin's financial arrangements with Geisler and Roberdeau. Geisler and Roberdeau did not talk to Malick about the details of their relationship with Rubin. Geisler could not recall discussing with Malick any of the details of the financial arrangements between Rubin, on the one hand, and Geisler and Roberdeau on the other.

7. Geisler

After May 1994, Geisler believed that he and Roberdeau had bought Rubin out of the Briarpatch partnership at Rubin's specific request and that Rubin had no interest in the Briarpatch partnership thereafter. At the time Geisler and Roberdeau entered into the Phoenix TRL Acquisition Agreement with Phoenix, dated April 1996, Geisler and Roberdeau "genuinely believed" that Rubin no longer had any interest in the Briarpatch Partnership, and thus had no claim to any proceeds derived from the sale to Phoenix of the TRL Motion Picture Rights. (Defs.' Ex. 33 at 158:14-159:11, 187:14-17, 444:9-14.) Geisler and Roberdeau did not pay to Rubin, and did not provide Rubin with any accounting of, any funds received from Phoenix in connection with the acquisition of the TRL Motion Picture Rights because Geisler and Roberdeau thought that Rubin was out of the Briarpatch partnership and that Geisler and Roberdeau did not have any obligation to provide any accounting to Rubin. According to the Plaintiffs, this belief was not held in good faith.

At the time of entering into the various agreements with Phoenix regarding the Phoenix TRL Acquisition Agreement, Geisler believed that Briarpatch Film was still a legal entity and he assumed that when he and Roberdeau signed agreements on behalf of Briarpatch Film, "that Briarpatch Film was in force and in fact valid." (Id. at 546:19-547:17.)

Geisler was extremely unhappy with the behavior of Phoenix and Medavoy during the negotiations of the Phoenix TRL Acquisition Agreement and believed that Medavoy "wasn't on the level" with him in connection with negotiating the Phoenix TRL Acquisition Agreement. (Id. at 230:20-231:3.) Geisler also believed that he and Roberdeau were being extorted by Phoenix to give up "more and more and more unfair concessions to both Medavoy and Malick." Geisler and Roberdeau felt that they were being "blackmailed." (Id. at 239:13-240:5).

Discussion

1. The Summary Judgment Standard

Pursuant to Rule 56, summary judgment may be granted only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); SCS Communications, Inc. v. Herrick Co., 360 F.3d 329, 338 (2nd Cir. 2004). The court will not try issues of fact on a motion for summary judgment, but rather, will determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986).

Summary judgment is appropriate where the moving party has shown that "little or no evidence may be found in support of the nonmoving party's

case. When no rational jury could find in favor of the nonmoving party because the evidence to support the case is so slight, there is no genuine issue of material fact and a grant of summary judgment is proper." Gallo v. Prudential Residential Servs., Ltd., P'ship, 27 F.3d 1219, 1223-24 (2nd Cir. 1994) (internal citations omitted). The moving party has the burden of showing that there are no material facts in dispute, and the court must resolve all ambiguities and draw all reasonable inferences in favor of the party opposing the motion. Bickhardt v. Ratner, 871 F.Supp. 613 (S.D.N.Y. 1994) (citing Celotex, 477 U.S. 317).

2. The Copyright Claims Against Defendant Phoenix Are Dismissed.

The FAC's Fifth and Sixth Causes of Action (FAC ¶¶ 155-181) allege two federal copyright claims against Phoenix that are based upon the same facts as the two state law claims in the original complaint that this Court, and the Second Circuit, found subject to complete preemption by the federal Copyright Act. When moving to amend the complaint, Plaintiffs admitted that the FAC copyright claims "do not raise substantially new theories of recovery" that might differ from their original complaint. (Pls.' Mem. in Supp. of Motion to Amend, Apr. 20, 2005, 12.) Plaintiffs indicated that their purpose in filing the FAC was "to assert under the Copyright Act their declaratory judgment claims as to screenplays and other property ... [and] to convert their prior 'unjust enrichment' claim into a 'copyright infringement' claim on the same facts and

occurrences and for similar relief as that previously pleaded ..." (Pls' Reply Mem., June 1, 2005, 1.).

Now considering these claims under this Court's copyright jurisdiction, summary judgment is again granted in favor of the Defendant, and the claims are dismissed. Accordingly, Plaintiffs' motion for partially summary judgment declaring Briarpatch the owner of the Malick screenplay and other related rights to TRL is denied.

a. The Declaratory Judgment Claim Is Dismissed for Failure of Proof

Plaintiffs have again asserted a declaratory judgment claim to have Briarpatch named the owner of the Malick screenplay and related rights in TRL. Both Plaintiffs and Defendants have effectively moved for summary judgment on this claim. Granting summary judgment to the Defendants on the prior claim, albeit asserted under different jurisdiction, the October 30 Opinion concluded that "neither Briarpatch nor Rubin was the legal owner of the motion picture derivative rights to 'The Thin Red Line' novel and screenplay at the time Phoenix entered into and fully performed the Phoenix TRL Acquisition Agreement, which was negotiated in 1995 and 1996." Briarptch Ltd., 2002 WL 31426207 at *12.

Plaintiffs have not presented any law or facts that would cause this conclusion to be altered. Instead, Plaintiffs assert a series of arguments similar to those made previously, all of which are unavailing.

i. Plaintiffs Were Never the Legal Owner of the TRL Motion Picture Rights Prior to the Phoenix TRL Acquisition Agreement

First, although plaintiffs have conceded that Briarpatch Film acquired the TRL Motion Picture Rights, including rights to the Malick screenplay (Pls.' Resp. to Defs.' Local Rule 56.1 Statement ¶¶6-10), they nevertheless contend that Briarpatch Film conveyed those rights to the Briarpatch partnership when it entered into the Limited Partnership Agreement in March 1994. This contention is without merit.

Prior to Phoenix entering into the Phoenix TRL Acquisition Agreement, Briarpatch Film was the legal owner of the TRL Motion Picture Rights and had owned those rights since 1989. See 17 U.S.C. §§ 201(d), 204. As previously established, Briarpatch Film acquired the motion picture rights to the TRL novel through a written contract dated May 1, 1989, with the estate of James Jones and a written contract dated April 1, 1990, with Philip Yordan. Briarpatch Film owned the Malick screenplay based upon the TRL novel pursuant to a written contract with Malick dated January 1, 1989. See id.

Furthermore, Briarpatch Film had recorded its ownership of those TRL Motion Picture Rights with the United States Copyright Office in 1990 and 1992. Therefore, since 1990, Briarpatch Film had ownership of the TRL Motion Picture Rights and Rubin had constructive notice from the Copyright

Office records that Briarpatch Film owned the TRL Motion Picture Rights. See id. §205(c).

Rubin, Briarpatch Film, and the other four Geisler/Roberdeau companies entered into the Limited Partnership Agreement in March 1994. The Limited Partnership Agreement set forth the partners respective obligations and rights. Rubin was the sole limited partner, and the general partners were the five Geisler and Roberdeau entities, including Briarpatch Film.

In the Limited Partnership Agreement, Rubin expressly agreed that he had no "right, title or interest of any kind whatsoever in or to any Project (including, without limitation, any copyrights or any income derived therefrom." Rubin expressly agreed that the general partners would have "the unrestricted right to sell or assign, and to pledge, mortgage or otherwise hypothecate, any Project either in whole or in part, without obtaining the consent of Rubin." The Limited Partnership Agreement expressly provided that "the copyrights in the projects shall be registered in the name of [any general partner] or such party as [any general partner] in its sole business judgment may determine proper." Under the Limited Partnership Agreement, Rubin had the right to be reimbursed for the applicable project development expenses he financed from any "development expense reimbursements" received with respect to any Project, including the TRL. In addition, Rubin was to receive a percentage of all "distributable cash" derived from any of the Projects, including the TRL.

Plaintiffs assert that through correspondence and testimony, the Geisler/Roberdeau Parties acknowledge and confirm that after the January 1, 1994 effective date of the Limited Partnership Agreement, the TRL Project and related rights were owned by the partnership and that such an acknowledgment is binding against Phoenix. (Pls.' Mem. In Supp. 17-18). Specifically, Plaintiffs point to the Limited Partnership Agreement, Roberdeau's April 1994 letter to Rubin (Pls.' Ex. 16), the May 1994 buyout offer to Rubin (Pls. Ex. 17), and Geisler's deposition testimony (Pls.' Ex. 52 at 139:17-25 & 141:16-142:10). Upon examination, however, none of the documents or testimony to which the Plaintiffs refer acknowledges the partnership's ownership of the TRL Motion Picture Rights. At most, they acknowledge the Limited Partnership Agreement and Geisler and Roberdeau's fiduciary duty to the Plaintiffs created by that agreement.

Therefore, based on the evidence presented, there is no issue of material fact as to whether Rubin or Briarpatch was ever an owner of the TRL Motion Picture Rights prior to execution of the Phoenix TRL Acquisition Agreement.

ii. No Court Has Determined that Plaintiffs Ever Owned Legal Title to the TRL Motion Picture Rights.

Next, Plaintiffs contend that in the original New York action, the court determined that plaintiff Briarpatch was and is the owner of the TRL screenplay and other related rights. At best, however, the 1999 judgment of Justice Tompkins

determined that plaintiff Briarpatch had a "beneficial interest" in the TRL Motion Picture Rights and, therefore, was entitled to share in the proceeds derived by Geisler, Roberdeau, GRI, and Briarpatch Film from the exploitation of those rights by assignment to Phoenix. (Defs.' Ex.s 27 & 28.) Furthermore, the decisions of the New York courts upon which Plaintiffs' assertions are based are not binding on either Phoenix or Medavoy, as neither was a party to any of these actions. The October 30 Opinion reached these same conclusions. See Briarpatch Ltd., 202 WL 31426207 at *12.

In the original New York action, the court awarded damages in the sum of $1,500,000 because such sum was "converted by [Geisler and Roberdeau] from the proceeds paid by Phoenix Pictures for 'The Thin Red Line' ... " (Pls.' Ex. 1.8 at 28 ¶3.) It referred expressly to the beneficial right, title, and interest, not to any legal right or title: "as of January 1, 1994, all beneficial right, title and interest" in and to, among others, "The Thin Red Line" belonged to and was owned by" plaintiff Briarpatch. (Id. at 27 ¶1.) The legislative history accompanying the Copyright Act indicates that a "beneficial owner" may be someone who has given up exclusive rights to use or license the use of copyright assets in exchange for the right to receive future remuneration from the exploitation of the copyright involved. See Cortner v. Israel, 732 F.2d 267, 271 (2nd Cir. 1984) (citing H.R. Rep. No. 1476, 94th Cong., 2nd Sess. 159, reprinted in 1976 U.S. Code Cong. & Ad. News 5659, 5775).

Specifically, the New York State Supreme Court determined:

> that as between, on the one hand, the [Briarpatch] Partnership and, on the other hand, Defendants Geisler and Roberdeau and their affiliates ... (i) all remuneration in connection with the Projects [including "The Thin Red Line"] belong to and should have been ... paid directly to the [Briarpatch] Partnership; and (ii)... insofar as Defendants Geisler and Roberdeau and their affiliates may have acquired, held or hold any right, title, or interest in any of the Projects [including "The Thin Red Line"] or remuneration in connection with the Projects all such right, title and interest is hereby transferred to and vested, effective immediately in the [Briarpatch] Partnership.

(Pl.s.' Ex. 1.8 at 27-28 ¶2.)

The date of the state court order was October 14, 1999. (Defs.' Ex. 27) By that date, the TRL Motion Picture Rights had been conveyed to Phoenix pursuant to the Phoenix TRL Acquisition Agreement. In addition, the TRL motion picture produced by Phoenix based upon those rights had been produced and released ten months earlier, in December 1998. Accordingly, Justice Tompkins referred to "remuneration" in the order so as to reflect the prior assignment of the TRL Motion Picture Rights to Phoenix.

Subsequent to the 1999 decision in the original New York action, a special referee's report in the "Night Hawk Litigation," Briarpatch Ltd. LP & Gerard F. Rubin v. D.M. Thomas, et al (Index No. 603364/2001), recognized that Phoenix is "the entity now controlling" TRL and that the $1,500,000 paid by Phoenix for the TRL Motion Picture Rights was "converted" by Geisler and Roberdeau. Briarpatch Ltd., 2002 WL 31426207, at *12. The matters before Referee Crespo in the Night Hawk Litigation were limited to the accounting and damage issues related solely to the "White Hotel" and "Peter Pan/The Boy Castaways" projects. Refere Crespo's summary of Justice Tompkins' 1999 findings with respect to the transfer of all of the TRL Motion Picture Rights to Phoenix, was consistent with Rubin's verified allegation in the original New York action that "Geisler, Roberdeau, and their affiliates (including without limitation Geisler/Roberdeau Incorporated) secretly assigned as of August 26, 1996, the rights in and to The Thin Red Line to Phoenix Pictures, Inc., which later assigned the rights in The Thin Red Line to Twentieth Century Fox Film Corporation." (Defs.' Ex. 29 ¶36.)

In February 2006, counel for the Plaintiffs asked Justice Moskowitz to amend what counsel for the Plaintiffs represented to be "certain erroneous and unsupported findings of fact" made by Referee Crespo. (Pls.' Ex. 51.) The effect of Plaintiffs' proposed changes was to characterize Justice Tompkins' findings to be that "neither Geisler, Roberdeau, Geisler Roberdeau, Inc., nor Briarpatch Film Corp. [] assigned to Phoenix Pictures, Inc. any of the screenplays or agreements or other rights of

the Partnership (whether for The Thin Red Line project or otherwise) ..." (Id.) This request by counsel for the Plaintiffs was unopposed, and therefore Justice Moskowitz entered an order making the requested changes to Referee Crespo's report. (Id.)

There is no reason, however, that Justice Moskowitz's mischaracterization in the court's 2006 Judgment and Order of Justice Tompkins' findings should in anyway supersede Justice Tompkins' actual findings in the original New York action.

Regardless, as was concluded in the October 30 Opinion, the findings in either of these state court actions are not binding upon Phoenix and Medavoy. A court's determination of law or fact can have preclusive effect in another action only against a party to the first action and those in privity with such a party. N.L.R.B. v. Thalbo Corp., 171 F.3d 102, 109 (2nd Cir. 1999); Ryan v. New York Telephone Co., 467 N.E.2d 487, 490 (N.Y. 1984). For a prior decision to have preclusive effect in a new action, the party against whom preclusion is sought must have had "a fair and full opportunity to contest the decision" in the first action. Metromedia Co. v. Fugazy, 983 F.2d 350, 365 (2nd Cir. 1992), cert. denied, 508 U.S. 952 (1993); Kaufman v. Ei Lilly and Co., 65 N.Y.2d 449, 455-56 (N.Y. 1985). Neither Medavoy nor Phoenix was a party to either the original New York action or the Night Hawk Litigation.

Accordingly, the New York State Supreme Court determinations have no preclusive effect on

the instant action and, at best, determined that plaintiff Briarpatch was entitled to share in the proceeds derived from the exploitation of the TRL Motion Picture Rights as an owner of a "beneficial interest" in those rights.

iii. Plaintiffs Are Estopped from Denying the Assignment to Phoenix.

Finally, as was concluded in the October 30 Opinion, the Plaintiffs are estopped from arguing that the TRL Motion Picture Rights were not assigned to Phoenix because in the verified complaint in the original New York action, Plaintiffs alleged that those rights had been assigned in August 1996 to Phoenix. Briarpatch Ltd., 2002 WL 31426207, at *13. Specifically, in the original New York action brought by Plaintiffs against Geisler and Roberdeau, Rubin stated in his verified complaint that "Geisler, Roberdeau, and their affiliates .... secretly assigned ... the rights in and to The Thin Red Line to Phoenix Pictures, Inc. ..." (Pls.' Ex. 34 ¶36.) Accordingly, Plaintiffs are estopped from denying the assignment. See New Hampshire v. Maine, 532 U.S. 742, 750-51 (2001); Uzdavines v. Weeks Marine, Inc., 418 F.3d 138, 147 (2nd Cir .2005) (citing New Hampshire v. Maine, 532 U.S. at 749, 750-51).

The doctrine of judicial estoppel contains the following three factors: (1) the party against whom estoppel is asserted must have argued an inconsistent position in a prior proceeding; (2) the prior inconsistent position must have been adopted by the court in some manner; and (3) the party

against whom estoppel is asserted would derive an unfair advantage or impose an unfair detriment on the opposite party if not estopped. New Hampshire v. Maine, 532 U.S. at 750-51; Uzvanides. 418 F.3d at 147 (quoting New Hampshire v. Maine, 532 U.S. at 750-51).

In the instant action, Plaintiffs seek to recover from Phoenix on the basis that the TRL Motion Picture Rights were not assigned to Phoenix. In the original New York action, however, plaintiffs persuaded the New York State Supreme Court to accept their contrary position that the TRL Motion Picture Rights had been conveyed to Phoenix. This resulted in the court's decision that the proceeds derived from the transfer of those rights had been converted when they were not shared with the Plaintiffs. The Plaintiffs obtained the benefit of a money judgment against Geisler, Roberdeau, and their affiliates, recovering $1,500,000 on the basis that the TRL Motion Picture Rights had been assigned to Phoenix.

Although the Plaintiffs content that judicial estoppel should not be applied (Pls.' Mem. In Opp'n, Aug. 22, 2006 (Pls.' Mem. In Opp'n"), 12-15), their arguments are unavailing.

With regard to the inconsistency, Plaintiffs assert that their previous position of the TRL Project rights being "secretly assigned" to the Defendants can be reconciled with their position in the current litigation that only a quitclaim was assigned to the Defendants. See Simon v. Safelite Glass Corp., 128 F.3d 68, 73 (2nd Cir. 1997) (citing AXA Marine &

Aviation Ins. (UK) Ltd. v. Seajet Indus., Inc., 84 F.3d 622, 628 (2nd Cir. 1996); In re Brody, 3 F.3d 35, 39 (2nd Cir. 1993); Desjardins v. Van Buren Cmty. Hosp., 37 F.3d 21, 23 (1st Cir. 1994)) ("If the statements can be reconciled there is no occasion to apply an estoppel.") Plaintiffs' quitclaim argument is being asserted, however, in an effort to show that the TRL Motion Picture Rights were not assigned to Phoenix, and this is clearly inconsistent with the position taken by the Plaintiffs in the original New York action. Nor have the Plaintiffs satisfactorily shown that the inconsistency is the result of an unintentional error or good faith mistake. See Safelite Glass Corp., 128 F.3d at 73 (citing Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 362 (3d Cir. 1996); John S. Clark Co. v. Faggert & Frieden, P.C., 65 F.3d 26, 29 (4th Cir. 1995); Konstantinidis v. Chen, 626 F.2d 933, 939-40 (D..C. Cir. 1980)).

As to the adoption of Plaintiffs' prior inconsistent position, despite Plaintiffs' continued contention that the court in the original New York action concluded that plaintiff Briarpatch was and is the owner of the TRL Motion Picture Rights, it has been determined that, at best, the 1999 judgment determined that Plaintiff Briarpatch had only a "beneficial interest" in the TRL Motion Picture Rights. Where, as here, Plaintiffs assert a position clearly inconsistent with a previously held position upon which the Plaintiffs obtained the benefit of a money judgment, application of judicial estoppel is appropriate.

Finally, because Plaintiffs did obtain a money judgment in the original New York action, they would derive an unfair advantage if they were allowed to pursue follow-on litigation based on a clearly inconsistent factual assertion.

Accordingly, Plaintiffs are estopped from making the contrary argument here that the TRL Motion Picture Rights were not assigned to Phoenix.

For all the foregoing reasons, Plaintiffs' Fifth Cause of Action for declaratory judgment is dismissed.

b. The Copyright Infringement Claim Is Dismissed for Failure of Proof.

Plaintiffs' Sixth Cause of Action is against defendant Phoenix for copyright infringement. A motion picture based upon a preexisting literary work, whether a novel or a screenplay, is a derivative work separately copyrightable. 17 U.S.C. §§ 101, 103(a). The right to produce such a motion picture based upon a prior existing work is considered a motion picture derivative right. 17 U.S.C. §106(2). Plaintiffs have alieged that they own the TRL Motion Picture Rights and assert that because Phoenix has produced and exploited the TRL motion picture, that Phoenix has violated or infringed the TRL Motion Picture Rights that Plaintiffs came to own. This is a classic copyright claim and asserts that Phoenix has created and exploited an unauthorized derivative work. 2 Nimmer on Copyrights §8.09[B] at 8-142 (2002).

A plaintiff must prove two elements in order to establish copyright infringement: "1) ownership of a valid copyright, and (2) copying of constituent elements of that work that are original. " Feist Publ'ns, Inc. v. Rural Telephone Serv. Co., 499 U.S. 340, 361 (1991); see also Laureyssens v. Idea Group, Inc., 964 F.2d 131, 129 (2nd Cir. 1992) (stating second element as "infringement by unauthorized copying"). The Plaintiffs cannot prove facts sufficient to establish either of the elements of this claim.

First, based on the foregoing analysis of the ownership of the TRL Motion Picture Rights, the Plaintiffs were never and are not now the owners of those rights.

Second, even if Plaintiffs were considered to be "beneficial owners" of the TRL Motion Picture Rights for the purpose of bringing this claim,[6] the TRL film developed by Phoenix was not an unauthorized derivative work. Although Plaintiffs have asserted that the TRL Motion Picture rights

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[6] Under the Copyright Act, a beneficial owner may bring a claim for copyright infringement. See 17 U.S.C. §501(b); Cortner, 732 F.2d at 271. It is not clear, however, that a party like plaintiff Briarpatch that was never the owner of legal title to a copyright or any exclusive right protected by copyright would be considered a "beneficial owner" for the purposes of standing under the Copyright Act, regardless of any economic interest Briarpatch may have with respect to the exploitation of that right. See, e.g., Moran v. London Record, Ltd., 827 F.2d 180, 182-83 (7th Cir. 1987) (declining to extend concept of "beneficial owner" to an employee in a work made for hire situation); Cortner, 732 F.2d at 271 (citing example of an author who had parted with legal title in exchange for royalties or license fees).

were not effectively transferred to Phoenix in the Phoenix TRL Acquisition Agreement, Plaintiffs' assertions in this regard are unavailing.

Having already determined that the TRL Motion Picture Rights did not become the property of plaintiff Briarpatch as a result of Briarpatch Film's entering into the Limited Partnership Agreement, the contention that Briarpatch Film did not own or have the requisite authority to convey the rights to Phoenix will not be readdressed here.

Furthermore, as previously established, on October 23, 1996, Phoenix recorded in the Copyright Office a copy of the Short Form Option Agreement, signed by Geisler, Roberdeau, GRI, and Briarpatch Film, which referred to the TRL Motion Picture Rights, including rights to the Jones novel and the Malick screenplay. In addition, on December 22, 1998, Twentieth Century Fox Film Corporation filed in the Copyright Office a registration form for the TRL motion picture.

Understanding the TRL Motion Picture Rights to have been transferred to and recorded by Phoenix, an analysis of Plaintiffs' assertions as to the ineffectiveness of any such transfer follows.

i. The Dissolution of Briarpatch Film Has No Effect.

Without citing any authority, the Plaintiffs contend that because Briarpatch Film was administratively dissolved in 1993, it could not assign the TRL Motion Picture rights to Phoenix in

1996-1997. Yet Plaintiffs also assert that post-dissolution, Briarpatch Film entered into the Limited Partnership agreement in March 1994 and thereby transferred the same TRL Motion Picture rights to the partnership. In addition to being illogical, Plaintiffs' contentions regarding the impact of Briarpatch Film's dissolution are faulty on several grounds.

First, the assets of a dissolved corporation go to its shareholders. Briarpatch Ltd., 2002 Wl; 31426207, at *10 (citing In re Ivan Boesky Sec. Litig., 825 F.Supp. 623, 636 (S.D.N.Y. 1993) ("corporate assets [] ultimately belong to shareholders as equity owners of the corporation"), aff'd, 36 F.3d 255 (2nd Cir.)). The sole shareholders of Briarpatch Film were Geisler and Roberdeau. They are not partners in Briarpatch nor signatories to the Limited Partnership Agreement. They did, however, join in the assignment of the TRL Motion Picture Rights to Phoenix by entering into the Phoenix TRL Acquisition Agreement.

In addition, under the Limited Partnership Agreement, Rubin expressly gave the general partners, including Briarpatch Film:

> the complete, exclusive and unqualified control of all aspects of the business of the partnership, including over the ... exploitation and other disposition of any Projects, directly, or by any other party ... in accordance with such ... terms and conditions as [any general partner] in its sole business judgment may determine proper.

Defs.' Ex. 23 ¶3.1 (emphasis added)).

Second, although the Plaintiffs have sought to rely upon Briarpatch Film's status as a "dissolved" corporation, Rubin, Geisler, Roberdeau, and Phoenix all treated Briarpatch Film as a valid, qualified corporation at all times. For example, Rubin entered into the Limited Partnership Agreement with Briarpatch Film in 1994, even after Briarpatch Film had been dissolved. "New York law recognizes that a corporation which carries on its affairs and exercises corporate powers as before dissolution is a de facto corporation ... and, ordinarily, no one but the State may question its corporate existence." Bowditch v. 57 Laight Street Corp., 443 N.Y.S. 2d 785, 788 (N.Y. Sup. Ct. 1981); accord Garzo v. Maid of the Mist Steamboat Co., 303 N.Y. 516, 524 (N.Y. 1952).

Third, under applicable New York law, a corporation dissolved for failure to pay franchise taxes, like Briarpatch Film, must wind up its affairs and transfer its assets to shareholders or to others. Briarpatch Ltd., 2002 WL31 426207, at * 9 (citing 172 East 122 St. Tenants Ass'n v. Schwarz, 73 N.Y. 2d 340, 349 (1989)); Bowditch, 443 N.Y.S. 2d at 787-88; see also Garzo, 303 N.Y. at 524. Although the Plaintiffs now assert that the conveyance of the TRL Motion Picture Rights to Phoenix was beyond the power of the dissolved Briarpatch Film, acts of dissolved corporations have been upheld by the New York courts. For example, "dissolution does not effect either the right of a corporation to collect and distribute its assets or to sue in its corporate name."

Bowditch, 443 N.Y.S. 2d at 788. Indeed, the Bowditch court specifically acknowledged that "a contract entered into after dissolution had been held enforceable" by the New York state courts. Id.

The Plaintiffs further contend that the decision in Noise in the Attic Prods., Inc. v. London Records, 782 N.Y.S. 2d 1 (2004), prohibits Briarpatch Film after its dissolution from having the right to receive or administer monies or property (Pls.' Mem. in Opp'n 8.) Noise in the Attic Productions, Inc. ("NITA"), a record producer, was a dissolved New York corporation that sued to recover unpaid royalties from the sale of records NITA had produced or contracted to produce. Id. at 2-3. The trial court awarded damages to NITA for unpaid royalties and ordered that future royalties were to be paid to NITA, after which NITA was to distribute those royalties in accordance with certain agreements. Id. at 4. The Appellate Division reversed the order directing NITA to collect and administer future royalties because as a dissolved corporation that "indefinite right to receive and administer record royalties ... is unrelated to the winding up of NITA's business" making reference to N.Y. Business Corporation Law §1005[a][2] and its "winding up" theory. Id. at 5.

Here, in 1996, Briarptach Film disposed of what appears from the record in this action to have been its only asset, the TRL Motion Picture Rights. Therefore, the assignment of the TRL Motion Picture Rights to Phoenix, unlike the future royalties in Noise in the Attic Productions, Inc., could be related to the "winding up" of Briarpatch Film.

Accordingly, whether the TRL Motion Picture Rights were transferred to Phoenix by the sole shareholder of the dissolved Briarpatch Film, the de facto Briarpatch Film, or as part of a "winding up" of Briarpatch Film, the dissolution of Briarpatch Film in 1993 does not impact the transfer of the TRL Motion Picture Rights to Phoenix under the Phoenix TRL Acquisition Agreement.

ii. Plaintiffs' Quitclaim Argument Is Unavailing.

Next, Plaintiffs contend that the conveyance of the TRL Motion Picture Rights to Phoenix was only a "quitclaim" conveyance of the Geisler/ Roberdeau Parties' rights in the TRL Project. However, under the Phoenix TRL Acquisition Agreement, the grantors, including Briarpatch Film, expressly warranted and represented that they owned "all of the Rights" conveyed to Phoenix pursuant to the option granted in that agreement. (Def.'s Ex. 2 ¶9(a)(v).) The grantors further warranted and represented in the agreement that they had the full right, power, and authority to convey those rights. (Id. ¶9(a)(i).)

Even accepting Plaintiffs' description of the Phoenix TRL Acquisition Agreement as a quitclaim to Phoenix, those rights, including the TRL Motion Picture Rights, were successfully conveyed to Phoenix. It has long been the law that a quitclaim deed is as effective as a "warranty" deed provided that the title of the grantor is not defective. See Fletcher v. Delaware, L & W.R. Co., 79 F.2d 306 (2nd

Cir. 1935); Obrey v. Collins, 200 N.Y.S. 175, 176 (N.Y. Sup. Ct. 1923). "In modern practice, a quitclaim is used when a grantor intends to convey only such interest as he has as opposed to a grant of the fee or other estate with warranty of title, and it is just as effective to pass such title as any other form of conveyance." 43A N.Y. Jur. 2nd Deeds, §228 (2006).

Therefore, regardless of whether the conveyance to Phoenix was of only a quitclaim, because Briarpatch Film or its successors held the title to the TRL Motion Picture Rights, those rights were effectively conveyed to Phoenix.

iii. Plaintiffs' Payment Argument is Without Merit.

Finally, Plaintiffs contend that Phoenix did not acquire the TRL Motion Picture Rights pursuant to the Phoenix TRL Acquisition Agreement because in exercising its option under the agreement, Phoenix made payments to GRI, Rather than to Briarpatch Films. However, the subsequent Buyout Agreement stipulates:

> Pursuant to the April 1996 Agreement, Phoenix purchased all of the "Rights" in and to the "Property" ... and none of the Geisler/Roberdeau Parties owns or has any right, title or interest in or to the Rights, the Property or the Project except, only in respect of the Project, the right to receive the payments, credits and other consideration

> expressly provided for in the Letter Agreement as modified herein ...

(Defs.' Ex. 2 ¶C.)

In addition, the Limited Partnership Agreement gave the General Partners "complete, exclusive and unqualified control ... over the development ... exploitation and other disposition of any Projects ... in accordance with such sales methods, policies, terms and conditions as [General Partner] in its sole business judgment may determine to be proper." (FAC Ex. ¶1 3.1) The Limited Partnership Agreement also stipulated that it was not to be construed as creating "a trust or specific fund as to sums which may be due to any of the parties hereto" or preventing or precluding the general partners from commingling income from the Projects with any other funds. (Id. ¶8.)

Furthermore, as previously established, GRI did transfer $195,000 of a $277,000 payment it received from Phoenix and $200,000 of a $300,000 it received from Phoenix to a Briarpatch Film account in London.

Accordingly, based on the foregoing analysis, the TRL Motion Picture Rights were effectively conveyed to Phoenix and, as a result, the TRL motion picture as produced by Phoenix was not an unauthorized derivative work.

Therefore, having failed to establish either of the elements of a copyright infringement claim

against Phoenix, Plaintiffs' Sixth Cause of Action is dismissed.

3. The Breach of Fiduciary Duty Claims against Defendants Phoenix and Medavoy Are Dismissed.

The Plaintiffs' fiduciary duty claims are reasserted against Phoenix and Medavoy in the FAC's First and Second Causes of Action. (FAC ¶¶131-147.) The Plaintiffs allege in the FAC that Phoenix and Medavoy conspired with or aided and abetted Geisler and Roberdeau's breach of fiduciary duty whereby Geisler and Roberdeau failed to account or pay to Rubin or to Briarpatch the $1.5 million received from Phoenix as consideration, inter alia, for the transfer to Phoenix of the TRL Motion Picture rights from the Geisler/Roberdeau Parties.[7]

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[7] In Plaintiffs' response to Defendants' motion for summary judgment, Plaintiffs request to amend the complaint to include a breach of fiduciary duty claim against Phoenix. (Pls.' Mem. In Opp'n 17-18.) The federal courts have interpreted Rule 15, Fed. R. Civ. P., to permit such amendments only when: (1) the party seeking the amendment has not unduly delayed, (2) when that party is not acting in bad faith or with a dilatory motive, (3) when the opposing party will not be unduly prejudiced by the amendment, and (4) when the amendment is not futile. See Foman v. Davis, 371 U.S. 178, 182 (1962); Mackensworth v. S.S. Am. Merchant, 28 F.3d 246, 251 (2nd Cir. 1994); Prudential Ins. Co. v. BMC Indus., Inc., 655 F.Supp. 710, 711 (S.D.N.Y. 1987). Furthermore, "it is well established that leave to amend a complaint need not be granted when amendment would be futile." Eillis v. Chao, 336 F.3d 114, 126 (2nd Cir. 2003) (citing Foman, 371 US. at 182); accord Nowakowski v. Kohlberg, No. 89 Civ. 5621, 1991 WL 3028, at *2 (S.D.N.Y. Jan. 8, 1991).

The Plaintiffs' proposed amendment to the FAC has been unduly delayed. Plaintiffs' prior motion to amend the

As already determined by the Court of Appeals, this Court has the power using its supplemental jurisdiction under 28 U.SC. §1367(a) to hear the claims relating to breach of fiduciary duty,[8] but must exercise its discretion under 28 US.C. §1367(c) to determine whether to hear such claims.[9] Briarpatch Ltd., 373 F.3d at 308.

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complaint was granted. Briarpatch Ltd., 2005 WL 2861604, at *2, and the Plaintiffs have filed an amended complaint, to which the pending motions relate.

The Plaintiffs' proposed amendment would also be futile. See, e.g., S.S. Silberblatt, Inc. v. East Harlem Pilot Block, 608 F.2d 28, 42 (2nd Cir. 1979); Freeman v. Marine Midland Bank-New York, 494 F.2d 1334, 1338 (2nd Cir. 1974). The proposed amendment is based on the theory that Phoenix became a fiduciary to the Plaintiffs when Phoenix acquired the TRL Motion Picture rights from the Geisler/Roberdeau Parties; in other words, that the fiduciary duty of the Geisler/Roberdeau Parties pursuant to the Limited Partnership Agreement was passed on to Phoenix under the Phoenix TRL Acquisition Agreement. Plaintiffs have not provided any supporting law and are judicially estopped from taking such a position. See supra.

Accordingly, plaintiffs request to amend the complaint is denied.

[8] Section 1367(a) provides that:

> Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

28 U.S.C. §1367(a).

[9] Section 1367(c) provides that a district court may decline to exercise supplemental jurisdiction over a state law claim if:

a. The Court Exercises Supplemental Jurisdiction.

The fact that the claims remaining in this action arise under state law does not require automatic dismissal for lack of subject matter jurisdiction. To the contrary, "the district court may, at its discretion, exercise supplemental jurisdiction over state law claims even where it has dismissed all claims over which it had original jurisdiction, [even though] it cannot exercise supplemental jurisdiction unless there is first a proper basis for original federal jurisdiction.'" Parker v. Della Rocco, 252 F.3d 663, 666 (2nd Cir. 2001) (quoting Nowak v. Ironworkers Local & Pension Fund, 81 F.3d 1182, 1187 (2nd Cir. 1996). The statutory authority for the exercise of such supplemental jurisdiction is found in 28 US.C. §1367(c) (3), according to which a district court "may decline to exercise supplemental jurisdiction over a claim ... if ... [it] has dismissed all claims over which it has original jurisdiction," as is the case here. 28 U.S.C. §1367(c)(3) (emphasis added).

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(1) the claim raises a novel or complex issue of State law,
(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
(3) the district court has dismissed all claims over which it has original jurisdiction, or
(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.
38 USC. §1367(c).

The district court's discretion is not without limit, however. As recently articulated by the Second Circuit:

> Once a district court's discretion is triggered under §1367(c) (3), it balances the traditional "values of judicial economy, convenience, fairness, and comity," Cohill, 484 U.S. at 350, 108 S. Ct. 614, in deciding whether to exercise jurisdiction. See Itar-Tass Russian News Agency v. Russian Kurier, Inc., 140 F.3d 442, 446-47 (2nd Cir. 1998).

Kolari v. New York-Presbyterian Hosp., 455 F.3d 118, 122 (2nd Cir. 2006). In addition, the district court is aided by the Supreme Court's guidance in Carnegie-Mellon University v. Cohill, 484 U.S. 343 (1998): "when the federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice." Id. at 350 (citing United Mine Workers v. Gibbs, 383 US. 715, 726-27 (1966). As indicated by the Supreme Court, however, this is not a mandatory rule, but rather recognizes that in the "usual case" in which all federal-law claims have been eliminated prior to trial, the balance of factors will weigh in favor of declining to exercise jurisdiction. Id. at 350 n.7.

This is not the "usual case," nor is this lawsuit in its "early years." The case was removed to this Court more than seven years ago, in September 1999. Since that time, there has been extensive discovery in the case. This Court has already

rendered decisions on several motions, some of which have already been considered on appeal, and the case remanded to this Court for further proceedings. The Court is already familiar with the state law issues in the case due to prior determinations on summary judgment, and none of the state law claims involve novel questions of law. Accordingly, the interests of judicial economy, convenience, and fairness weigh strongly in favor of exercising supplemental jurisdiction over these state law claims.

There have been similar cases in which the Second Circuit has concluded that a district court rightfully exercised its supplemental jurisdiction even after all of the federal-law claims in the action had been dismissed. For example, the Second Circuit upheld the district court's exercise of supplemental jurisdiction after the federal-law claims had been dismissed in Raucci v. Town of Rotterdam, 902 F.2d 1050 (2nd Cir. 1990), where discovery had been completed, three dispositive motions had been determined, the case was ready for trial, the state law claims did not involve novel legal questions, and the district court was familiar with the state law issues as a result of prior motions. Id. at 1055; see also Valencia v. Lee, 316 F.3d 299, 305-06 (2nd Cir. 2003) (comparing cases).

Accordingly, with due consideration for the concerns of judicial economy, convenience, fairness, and comity, and pursuant to 28 US.C. §1367(c) (3), this Court exercises supplemental jurisdiction over Plaintiffs' breach of fiduciary duty claims.

b. Plaintiffs Had Access to Extensive Discovery.

The Second Circuit instructed this Court that, were it to exercise supplemental jurisdiction over these claims, it could not rely on its prior decision to grant summary judgment in favor of the Defendants unless it first determined that the Plaintiffs' access to information had not been hindered by this Court's earlier dismissal of GRI from the litigation. Briarpatch Ltd., 373 F.3d at 309. Given the extended discovery afforded to Briarpatch Ltd., 2005 WL 2861604, at *2, and conducted by the Plaintiffs in this case (Pls.' Reply Mem. 9-10), it is concluded that the Plaintiffs' access to evidence has not been hindered by the prior dismissal of GRI.

c. The Aiding and Abetting Claim Is Dismissed for Failing of Proof

Under New York law, aiding and abetting a breach of fiduciary duty requires plaintiffs to prove: (1) the existence of a violation committed by the primary (as opposed to the aiding and abetting) party; (2) "knowledge" of this violation on the part of the aider and abettor; and (3) "substantial assistance" by the aider and abettor in achievement of the violation. Briarpatch Ltd., 2002 WL 31426207, at *7 (citing Moll v. U.S. Life Title Ins. Co., 654 F. Supp. 1012, 1030 (S.D. N.Y. 1987); Kolbeck v. LIT Am., Inc., 939 F. Supp. 240, 245 (S.D.N.Y. 1996), aff'd, 152 F.3d 918 (2nd Cir. 1998)). Under New York State law, the courts have also sometimes discussed the tort of "participating" in a breach of fiduciary duty. The elements for this tort

are similar to the tort of aiding and abetting a breach of fiduciary duty. Id. (citing S & K Sales v. Nike, Inc., 816 F.2d 843, 847-48 (2nd Cir. 1987) ("[t]he claimant must prove (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that the plaintiff suffered damages as a result of the breach.")); see also Whitney v. Citibank, N.A., 782 F.2d 1106, 1115 (2nd Cir. 1986); Philip Morris Inc. v. Heinrich, No. 95 Civ. 0328 (LMM), 1997 WL 781907, at *12 (S.D.N.Y. Dec. 18, 1997).

With respect to the knowledge requirement, the Second Circuit recently reiterated that "actual knowledge" is one of the three essential elements of the claim of aiding and abetting a breach of fiduciary duty under New York law:

> Under New York law, there are three elements to a claim for aiding and abetting a breach of fiduciary duty. The first element is "a breach by a fiduciary of obligations to another," of which the aider and abettor had "actual knowledge." Kaufman v. Cohen, 307 A.D. 2d 113, 125, 760 N.Y. S. 2d 157, 169 (1st Dept. 2003) ("Although a plaintiff is not required to allege that the aider and abettor had an intent to harm, there must be an allegation that such defendant had actual knowledge of the breach of duty.") ...

In re: Sharp Int'l Corp., 403 F.3d 43, 49 (2nd Cir. 2005); accord Pope v. Rice, No. 04 Civ. 4171 (DLC), 2005 WL 613085, at *12 (S.D.N.Y. Mar. 14, 2005).

"Constructive knowledge of the breach of fiduciary duty by another is legally insufficient to impose aiding and abetting liability." Kaufman v. Cohen, 760 NYS 2d 157, 169 (N.Y. App. Div. 1st Dep't 2003) (citing Kolbeck, 939 F. Supp. at 246); accord Pope, 2005 WL 613085, at *12; In re Centennial Textiles, Inc. v. Pennsylvania Textile, Corp., 227 B.R. 606, 612 (Bankr. S.D.N.Y. 1998).

In the instant case, Plaintiffs must show that the Defendants had actual knowledge that Geisler and Roberdeau were breaching their fiduciary duty to the plaintiffs under the Limited Partnership Agreement. With respect to Phoenix's knowledge, Plaintiffs assert that; (1) there is a reduced knowledge requirement where the defendant was either on notice as to the fiduciary's misconduct or had a financial motive to aid in such misconduct; and (2) "there is now substantial evidence that Phoenix and Medavoy had actual knowledge that Geisler/ Roberdeau and their companies were fiduciaries to the limited partnership with Rubin, and that payment of $1.5 million to non-partner Geisler Roberdeau, Inc. was in breach of the Limited Partnership Agreement. " (Pls.' Mem. in Opp'n 19.) Plaintiffs have failed, however, to present sufficient evidence of the requisite actual knowledge to support their claim of aiding and abetting.

Plaintiffs' assertion of a decreased knowledge requirement is unsupported. The reliance on Wright v. Bankamerica Corp., 219 F.3d 79 (2nd Cir. 2000), to support Plaintiffs' "financial motive" argument is misplaced in that Wright is not discussing a summary judgment standard, but whether an

amended pleading of scienter would satisfy Federal rule of Civil Procedure 9(b). Id. at 92. Regardless of whether such a reduced standard would apply, it is unclear how Phoenix would benefit financially from Geisler and Roberdeau's breach of fiduciary duty owed to the Plaintiffs.

Plaintiffs' reliance on Whitney v. Citibank, N.A. 782 F.2d 1106, is also misplaced. In Whitney, the plaintiff had entered into a general partnership with two other individuals. Defendant Citibank engaged in side-dealing with the other two general partners, keeping the plaintiff in the dark as to discussions among the defendant and the other two general partners, withholding documents that had been executed by the defendant and the other two general partners, and backdating documents. Therefore, it was no so much that the defendant was on notice regarding the possible misconduct of the two general partners with which it was dealing, but rather that the defendant's own actions provided additional evidence of Citibank's knowing participation in the misconduct. Whitney, 782 F.2d at 1116-17.

Here, Plaintiffs merely assert that Phoenix had some generalized knowledge of Geisler and Roberdeau's lack of trustworthiness: "Phoenix/ Medavoy knew 'red flags were waving', as to suspicious behavior of Geisler/Roberdeau, because they admit knowing Geisler/Roberdeau were 'misrepresenting their involvement in The Thin Red Line'... and Geisler/Roberdeau had a history of 'past indiscretions' and were 'charlatans,' 'con' men, 'dishonorable'; totally unreliable'; and in financial

distress."[10] (Pls.' Mem. in Opp'n 19 (internal citations omitted).) Despite Plaintiffs' contentions to the contrary, such assertions do not amount to Phoenix being on notice that Geisler and Roberdeau were or may have been breaching their fiduciary duty to the Plaintiffs, nor do they trigger a reduced knowledge requirement. In such circumstances, defendants do not have an obligation to make further inquiries. See Briarpatch Ltd., 2002 WL 31426207, at *9 (quoting Diduck v. Kaszycki & Sons Contractors, Inc., 974 F.2d 270, 283-84 (2nd Cir. 1992)) ('the court 'refused to place a duty of inquiry on third parties ... in an arms-length commercial transaction regular on its face ...'"). As the Whitney court stated: "Ordinarily, absent awareness of facts indicating that a partner is acting beyond his real or apparent authority, a third party is not obligated to investigate the matter further or search for some limitation on that partner's authority." Id. at 1115-16.

Plaintiffs also cite to Whitney in support of their contention that Phoenix had actual knowledge that it was aiding and abetting Geisler and Roberdeau's breach of fiduciary duty by paying consideration to GRI rather than to the Partnership. (Pls. Mem. In Opp'n 19.) As accurately cited by the Plaintiffs, Whitney stands for the tenet of

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[10] Plaintiffs are quoting, in part, Medavoy's deposition testimony, which goes on to elaborate that the misrepresentations of Geisler and Roberdeau's involvement had to do with the shooting of the film and the status of their relationship with Malick not with respect to any obligations under the Limited Partnership Agreement. (See Pls.' Ex. 47, at 174:19-175:13.)

partnership law that consideration for partnership property must be paid to the partnership. Whitney, 782 F.2d at 1116. As has already been determined, however, the TRL Motion Picture Rights that were transferred to Phoenix were not owned by the Briarpatch partnership, but rather by Briarpatch Film. Therefore, payment of consideration to GRI did not in any way aid or abet a breach of the Limited Partnership Agreement or the fiduciary duty owed to the Plaintiffs thereunder.

Furthermore, even if Phoenix had the actual knowledge attributed to it by the Plaintiffs, it still would not be sufficient to establish Phoenix's actual knowledge of a breach of fiduciary duty on the part of Geisler and Roberdeau.

First, assuming for the purposes of arguments that Phoenix had actual knowledge of the details of the Limited Partnership agreement, as is asserted by the Plaintiffs, the Limited Partnership Agreement granted the Geisler and Roberdeau entities the right, without consultation or approval of Rubin, to sell and transfer the TRL Motion Picture Rights. Accordingly, actual knowledge of the details of the Limited Partnership Agreement does not equate to knowledge that Geisler, Roberdeau, or any of their entities intended to breach or did breach any fiduciary duties established in that agreement and owed to the Plaintiffs. Similarly, knowledge of the provisions of the Limited Partnership Agreement does not mean that by agreeing to pay non-partner GRI pursuant to the Phoenix TRL Acquisition Agreement, the Defendants had "actual knowledge" that Geisler and Roberdeau were breaching or

intending to breach their fiduciary duties to the Plaintiffs.

Second, Plaintiffs contend that Malick would have known that Geisler and Roberdeau "were paying Gerry [Rubin] and sharing profits with Gerry [Rubin] and so forth ..." (Pl.s Mem. In Opp'n 20), and that such knowledge" regarding Rubin's financial involvement must be imputed as the knowledge of Phoenix because Malick, as director of the TRL, had become an employee of Phoenix by early 1997. (Id. at 21.) Even if such knowledge was imputed to Phoenix, hower, it does not establish actual knowledge on the part of the Defendants that Geisler and Roberdeau did not intend to perform their fiduciary duties to Rubin or Briarpatch.

As found above and in the October 30 Opinion, Malick did not know the details of any financial arrangements between Rubin and Geisler and Roberdeau. Malick met Rubin once at a cocktail party in 1992, but they did not discuss any financial details regarding the TRL or any other project being worked on by Geisler and Roberdeau. Geisler and Roberdeau did not discuss with Malick the details of their financial arrangements with Rubin. Thus, even if Malick's knowledge were to be imputed to Phoenix, Malick had no knowledge of the financial arrangements among Rubin, Geisler and Roberdeau, and had no knowledge that Geisler and Roberdeau intended to breach, or did breach, any fiduciary duties owed to the Plaintiffs.

Third, Plaintiffs contend that the Defendants had derived the requisite knowledge because Rubin

had been identified to them as a funder of the TRL Project. Mere knowledge of Rubin's investment in the project again falls far short of actual knowledge that Geisler and Roberdeau intended to or were breaching any fiduciary duty to Rubin. Any knowledge on the part of Phoenix that the Phoenix TRL Acquisition Agreement only assigned a quitclaim similarly falls short.

Finally, although it has been established that no later than September 1, 1998, the Defendants received copies of the letters from Rubin's attorney to Geisler and Roberdeau repeatedly requesting accountings of the Briarpatch partnership and threatening legal action against Geisler and Roberdeau, any resulting "knowledge" would have been acquired subsequent to the Defendants' having fully performed the Phoenix TRL Acquisition Agreement in Jul y 1997.

Therefore, Plaintiffs have failed to establish that defendant Phoenix knew at any time before fully performing under the Phoenix TRL Acquisition Agreement in July 1997 that Geisler and Roberdeau intended not to account to, or pay, Plaintiffs pursuant to the Limited Partnership Agreement.

The Plaintiffs have also failed to establish the substantial assistance element of their adding and abetting claim. As was concluded in the October 30 Opinion, there is no evidence in the record that Phoenix provided any substantial assistance to further Geisler and Roberdeau's breach of fiduciary duties.

To aid and abet a breach of fiduciary duty, the defendant must have provided "substantial assistance to the primary violator" which only "occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur." Kaufman, 760 N.Y.S. 2d at 170. Plaintiffs have not established Phoenix's substantial assistance under any of these methods.

First, the Plaintiffs have not shown that Phoenix affirmatively assisted Geisler, Roberdeau, and their entities in the breach of any fiduciary duty owed to the Plaintiffs. Specifically, Geisler did not testify that Phoenix provided any substantial assistance to any breach of fiduciary duty owed to the Plaintiffs. Rather, Geisler testified that he and Roberdeau did not account or pay to Rubin any of the proceeds received from Phoenix because Geisler and Roberdeau believed that since March 1994, Rubin had been "bought out" of the partnership and thereafter had no entitlement to receiving anything from Geisler and Roberdeau's exploitation of the TRL Motion Picture Rights. (Def.s Ex. 33 at 158:14-159:11, 443:25-444:21, 509:21-510:2, 511:3-10).

The Plaintiffs have further contended that Phoenix affirmatively assisted in the breach of fiduciary duty by paying the consideration to GRI rather than to Briarpatch Film. (Pls. Mem. in Opp'n 23.) As already discussed, payment to GRI did not breach the Limited Partnership Agreement. Furthermore, as the holder of the TRL Motion Picture Rights, Briarpatch Film was a party to both the Phoenix TRL Acquisition Agreement and the Buy-Out Agreement and consented to the method of

consideration. Indeed, it was confirmed in the Buyout Agreement, to which Briarpatch Film was a a signatory, that such consideration had been paid and that the rights had been acquired by Phoenix. (Defs.' Ex. 3 ¶c.)

Second, Phoenix did not hide its acquisition of the TRL Motion Picture Rights from the Geisler/ Roberdeau Parties. Rather, in October 1996, Phoenix recorded the transfer of those rights in the United States Copyright Office, by which action phoenix gave constructive notice to the world of Phoenix's deal with the Geisler/Roberdeau Parties. See 17 U.S.C. §205(c). Furthermore, Rubin testified that he knew that Phoenix had acquired those rights and contemplated litigation to stop Phoenix from producing the motion picture, but that he ultimately elected to do nothing. (Defs' Ex. 32 at 297:16-300:7.)

Third, inaction of an alleged aider and abettor may constitute "substantial assistance" only if the aider and abettor "owes a fiduciary duty directly to the plaintiff." Kaufman, 760 N.Y.S. 2d at 170. The Plaintiffs, however, have not established that Phoenix nor Medavoy owed a fiduciary duty to Rubin or Briarpatch.

Based on the foregoing analysis, Defendants have sufficiently shown that there is no issue of material fact that would withstand summary judgment on the Plaintiffs' claim against defendants Medavoy and Phoenix for aiding and abetting a breach of fiduciary duty. Accordingly, the claim is dismissed.

d. The Conspiracy Claim Is Dismissed.

New York courts do not recognize an independent tort of civil conspiracy. See, e.g., Kirch v. Liberty Media Corp., 449 F.3d 388, 401 (2nd Cir. 2006) (citing Alexander & Alexander of New York, Inc. v. Fritzen, 503 N.E. 2d 102, 102 (1986)). Since civil conspiracy is a derivative claim under New York law, a claim for conspiracy should be dismissed if the underlying tort claim either is not adequately pleaded or has been dismissed. See, e.g., id. ("since ITTC fails to state causes of action for either of the torts underlying the alleged conspiracy ... it necessarily fails to state an actionable claim for civil conspiracy."); Crigger v. Fahnstock & Co., Inc., 443 F.3d 230, 237 (2nd Cir. 2006) (citing Vasile v. Dean Witter Reynolds Inc., 20 F. Supp. 2d 465. 482 (E. D. N.Y. 1998) aff'd, 205 F.3d 1327 (2nd Cir. 2000) ("[U]nder New York law, civil conspiracy to commit fraud, standing alone, is not actionable ... if the underlying independent tort has not been adequately pleaded."); 20 N.Y. Jur. 2d, Conspiracy – Civ. Aspects §1 (2005)); Durante Bros. v. Flushing Nat'l Bank, 755 F.2d 239, 251 (2nd Cir. 1985) (citing Ahmed v. Nat'l Bank of Pakistan, 572 F.Supp. 550, 554-55 (S.D.N.Y. 1983); Powell v. Kopman, 511 F.Supp. 700, 704 (S.D.N.Y. 1981); ABKCO Indus. v. Lennon, 384 NYS 2d 781, 784 (1st Dept. 1976)) ("Count 7 was properly dismissed .... as failing to state a claim on which relief may be granted since New York law does not recognize a substantive tort of conspiracy."). Plaintiffs have not alleged a separate claim for breach of fiduciary duty in the FAC.

Despite this general rule, a limited tort of conspiracy has been recognized in a small number of cases. See Sec. Investor Prot. Corp. v. Stratton Oakmont, Inc., 234 B.R. 293, 332 (Bankr. S.D.N.Y. 1999) (naming cases). Such a claim may lie, however, only if the plaintiffs alleges, "in addition to conspiracy, independent overt acts undertaken in pursuit of that conspiracy." Id. Additionally, where the acts underlying a claim of conspiracy are the same as those underlying other claims alleged in the complaint, the conspiracy claim is dismissed as duplicative. See, e.g., Durante Bros., 755 F.2d at 251 ("Count 7 was properly dismissed ... as duplicative of counts 1-6..."); Sec. Investor Prot. Corp., 234 B.R. at 332; Kew Gardens Hills Apartment Owners, Inc. v. Horing Welikson & Rosen, P.C., 828 N.Y.S. 2d 98, 101 (N.Y. App. Div. 2d Dept. 2006). Here, Plaintiffs alleged overt acts in support of the conspiracy claim are essentially the same alleged acts that form the basis of the aiding and abetting claim. Therefore, the FAC's First Cause of Action (conspiracy) is duplicative of the Second Cause of Action (aiding and abetting).

Furthermore, [i]n order to sustain an allegation of civil conspiracy that involves a conspiracy to breach a fiduciary duty, all members of the alleged conspiracy must independently owe a fiduciary duty to the plaintiff." Pope, 2005 WL 613085, at *13 (citing Official Comm. of Unsecured Creditors v. Donaldson Lufkin & Jenrette Sec. Corp., No. 00 Civ. 8688 (WHP), 2002 WL 362794, at *13-14 (S.D.N.Y. Mar. 6, 2002)). Plaintiffs here have failed to establish that either of the Defendants owed a fiduciary duty to either of the Plaintiffs.

Notwithstanding all of these shortfalls, the Plaintiffs would be unable to factually support a conspiracy claim. Under New York law, civil conspiracy requires: "(1) the corrupt agreement between two or more persons, (2) an overt act, (3) their intentional participation in the furtherance of a plan or purpose, and (4) resulting damage." Pope, 2005 WL 613085 at *13 (citing Kashi v. Gratsos, 790 F.2d 1050, 1055 (2nd Cir. 1986)); accord Donaldson, Lufkin & Jenrette Sec. Corp., 2002 WL 362794, at * 13 (citing Kashi, 790 F.2d at 1054-55). The plaintiffs have not shown that the Defendants deliberately participated in an agreement with Geisler and Roberdeau or their entities to breach their fiduciary duties to the Plaintiffs. See Kashi, 790 F.2d at 1055.

Accordingly, the First Cause of Action is dismissed as against the Defendants.

4. Plaintiffs' Motion for Partial Summary Judgment to Dismiss Defendants' Affirmative Defenses Is Denied.

With all of the claims in the FAC against the Defendants having been dismissed, Plaintiffs' motion for partial summary judgment to strike the Defendants' affirmative defenses to the FAC is denied as moot. St. Paul Fire & Marine Ins. Co. v. Universal Builders Supply, 317 F.Supp. 2d 336, 339 n.5 (2nd Cir. 2004); Williams v. Bank Leumi Trust Co., No. 96 Civ. 6695 (LMM), 2000 WL 343897, at *8 (S.D.N.Y. Mar. 31, 2000).

Conclusion

For the reasons set forth above, the Plaintiffs' motions for partial summary judgment to declare Briarpatch the owner of the TRL screenplay and related rights and to dismiss the Defendants' affirmative defenses are denied. The Defendants' motion for summary judgment to dismiss the FAC as against the Defendants is granted.

Upon notice, judgment is to be submitted to the Court.

It is so ordered.

New York, NY
April 2, 2007

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIARPATCH LIMITED, L.P. and GERARD F. RUBIN,
Plaintiffs,
-against-

99 Civ. 9623 (RWS)

CORRECTED JUDGMENT

GEISLER ROBERDEAU, INC., PHOENIX PICTURES, INC., MICHAEL MEDAVOY, and TERENCE MALICK,
Defendants

Defendants Phoenix Pictures, Inc. ("Phoenix") and Morris Medavoy ("Medavoy") (collectively, "Defendants") having moved for summary judgment pursuant to Fed. R. Civ. P. 56, Plaintiffs Briarpatch Limited, L.P. ("Briarpatch") and Gerard F. Rubin ("Rubin") (collectively, "Plaintiffs") having moved simultaneously for partial Summary Judgment pursuant to Fed. R. Civ. P. 56, and for a declaratory judgment, and the Court, on April 2, 2007, having rendered its Opinion denying the motions of plaintiffs and granting defendants' motion for summary judgment and dismissing the first amended complaint against Phoenix and Medavoy in its entirety, it is

ORDERED, ADJUDGED AND DECREED that the judgment of this court, entered on April 23, 2007, which inadvertently referred to the dismissal of the complaint, is hereby corrected to refer to the

dismissal of the first amended complaint *nunc pro tunc*.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that for the reasons stated in the Court's Opinion dated April 2, 2007, plaintiffs' motions are denied and defendants' motion for summary judgment is granted and the first amended complaint as against Phoenix and Medavoy is dismissed in its entirety with prejudice; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendants recover from Plaintiffs costs and disbursements to be taxed separately by the Clerk of Courts; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court shall retain jurisdiction over this matter for the purpose of hearing a motion, as allowed by Fed. R. Civ. P. 54(d)(2), by Defendants for the recovery of full costs and attorney's fees pursuant to 17 US.C. §505.

Dated: New York New York
April 30, 2007

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

_____x

BRIARPATCH LIMITED, L.P
and GERARD F. RUBIN,
Plaintiffs

DOCKET 99 CIV 9623 [RWS]

-against-

GEISLER ROBERDEAU, INC.,
PHOENIX PICTURES, INC.,
and MORRIS 'MIKE'
MEDAVOY,
Defendants

_____x

ORDER AND JUDGMENT AGAINST DEFAULTING DEFENDANT GEISLER ROBERDEAU, INC.

This action having been commenced on August 18, 1999 by the filing of the Summons and Complaint with the County Clerk's Office for the Supreme Court of the State of New York, County of New York, and a copy of the Summons and Complaint having been served by and on behalf of plaintiffs BRIARPATCH LIMITED, L.P. (the "Partnership") and GERARD F. RUBIN ("Rubin", sole limited and designated winding up partner of the Partnership) on the defendant GEISLER ROBERDEAU, INC., a New York corporation, pursuant to the provisions of Section 306 of the Business Corporation Law of the State of New York by delivery thereof to defendant Geisler Roberdeau, Inc.'s statutory agent for the service of process, the Secretary of the State of New York on August 27, 1999, and a proof of service having been filed on

September 7, 1999 with the New York County Clerk's Office, and that action having been subsequently removed to this Court by Notice of Removal dated September 10, 1999, and then counsel for defendant Geisler Roberdeau, Inc. having appeared for Geisler Roberdeau, Inc. on November 3, 1999 in this action in this Court and having conceded and admitted on the record that Geisler Roberdeau, Inc. is bound by and vicariously liable under the July 12, 1999 Decision and the Order and Judgment entered and docketed October 14, 1999 against Robert Geisler and John Roberdeau in the prior action in the New York Supreme Court entitled *Briarpatch Limited, L.P. and Gerard F. Rubin v. Robert Geisler and John Roberdeau*, Index No. 606156/98 (Tr. of Nov. 3, 1999 at 13:4-11, 14:12-25, 20:5-16) and that to the extent Geisler Roberdeau, Inc. owns something related to The White Hotel or other Projects, "it goes to the Partnership" [namely Briarpatch Limited, L.P.] (Tr. of Nov. 3, 1999 at 18:8-12), and Plaintiffs Briarpatch Limited, L.P. and Gerard F. Rubin having been granted leave by this Court's Memorandum and Opinion #92352 signed October 27, 2005 and entered November 2, 2005 to file and serve an amended Complaint, and plaintiffs having filed such First Amended Complaint on November 14, 2005 with the Clerk of Courts of this United States District Court, and a copy of such First Amended Complaint having been served on defendant Geisler Roberdeau, Inc. pursuant to the provisions of Section 306 of the Business Corporation Law by delivery thereof to defendant Geisler Roberdeau, Inc.'s statutory agent for the service of process, the Secretary of the State of New York on November 14, 2005, and plaintiffs having served and

filed on November 30, 2005 a "Notice of Service Pursuant to 306 of the Business Corporation Law and Civil Practice Law and Rules 3215(f)(4)(i) & (ii)" dated November 30, 2005, and the defendant Geisler Roberdeau, Inc. having not answered or otherwise responded to the First Amended Complaint, and the time for answering or otherwise responding to the First Amended Complaint having expired, and this Court having found defendant Geisler Roberdeau, Inc. in default pursuant to an Opinion and Order dated September 24, 2007; it is

ORDERED, ADJUDGED, AND DECREED that the Plaintiffs Briarpatch Limited, L.P. and Gerard F. Rubin have judgment against defendant GEISLER ROBERDEAU, INC. in the amount of TWO MILLION EIGHT HUNDRED NINETY THOUSAND SIX HUNDRED EIGHTY-FOUR DOLLARS AND NINETY-THREE CENTS ($2,890,684.93), being the sum of (a) One Million Five Hundred Thousand Dollars ($1,500,000), which the state court found to have been diverted, converted, and misappropriated from Plaintiffs Briarpatch Limited, L.P. and Gerard F. Rubin with respect to The Thin Red Line Project, and for which defendant Geisler Roberdeau, inc. has previously admitted on the record of the November 3, 1999 proceedings in this Court that Geisler Roberdeau, Inc. is liable, and (b) interest accrued on that One Million Five Hundred Thousand Dollars ($1,500,000) at nine percent per annum (9%) from July 18, 1997, interest so accrued from July 18, 1997 through November 5, 2007 (a period of ten years and 110 days) being One Million Three Hundred Ninety Thousand Six Hundred Eight Four Dollars and Ninety-Three Cents ($1,390,684.93 for that period of

ten years and 110 days and $369.86 per day thereafter); and it is further

ORDERED, ADJUDGED, AND DECREED that imposition of a constructive trust and a constructive or equitable lien is confirmed on the One Million Five Hundred Thousand Dollars ($1,500,000) diverted, converted, and misappropriated from plaintiffs Briarpatch Limited, L.P. and Gerard F. Rubin which was paid to and received by defendant Geisler Roberdeau, Inc. with respect to The Thin Red Line Project, and also in all accounts, projects, rights, and other properties for which any or all of that One Million Five Hundred Thousand Dollars ($1,500,000) was disbursed.

New York, New York
November 8, 2007

APPENDIX E
ORDER AND JUDGMENT OF THE NEW YORK SUPREME COURT
As Recorded in the United States Copyright Office on October 18, 1999, Volume 3434, Page 242

At IAS Part 7 of the Supreme Court Court of the State of New York, held at the Courthouse on 60 Centre Street, New York, New York 10007 on the 27 day of Sept. 1999

PRESENT:
THE HONORABLE HAROLD TOMPKINS,
Justice

BRIARPATCH LIMITED, L.P. and GERARD F. RUBIN,
Plaintiffs
-against-
ROBERT GEISLER and JOHN ROBERDEAU,
Defendants

Index No. 606156/98

ORDER and JUDGMENT

Upon the pleadings, proofs and the prior decision in this case by Justice Gammerman, dated March 1, 1999, and this matter having come to trial without a jury on May 27, 28, and June 1, 4, and 11, 1999, and plaintiffs and defendants being duly represented by counsel, and the Court having rendered its decision on July 12, 1999,

NOW upon motion of Kaye, Scholer, Fierman Hays and Handler, LLP, attorneys for Defendants, it is hereby

ORDERED, ADJUDGED and DECLARED that as of January 1, 1994, all beneficial right, title, and interest of to film and stage plays entitled The Thin Red Line, The White Hotel, The English Speaker, Sansho the Bailiff, Secret Friends, Sunday in the Park with George, Beauty and the Beast, and Peter Pan/The Boy Castaways ("the Projects") resided with plaintiff Briarpatch Limited, L.P. (the "Partnership"); and it is further

ADJUDGED and DECREED that as between, on the one hand, the Partnership and, on the other hand, defendants Geisler and Roberdeau and their affiliates (including the Partnership Gerneral Partners, Geisler Roberdeau, Inc., The White Hotel Partnership, and Stage Fright LLC), (i) all remuneration in connection with the Projects belongs to and should have been and should be paid directly to the Partnership; and (ii) insofar as defendants Geisler and Roberdeau and their affiliates may have acquired, held, or hold any right, title, or interest in any of the Projects or remuneration in connection with the Projects all such right, title, and interest is hereby transferred to and vested, effective immediately in the Partnership;

ADJUDGED that Plaintiff Partnership Briarpatch Limited L.P. recover from Defendants Geisler and Roberdeau, jointly and severally the amount of $1,500,000 converted by them from the proceeds paid by Phoenix Pictures for The Thin Red

Line plus interest at the statutory rate (9%) since receipt of such proceeds (on July 18, 1997) by or on behalf of themselves or their affiliates (including without limitation the Partnership General Partners, Geisler Roberdeau, Inc., The White Hotel Partnership, and Stage Fright LLC) in the sum of $302,915.34, for a total of $1,802,915.34 and that Plaintiff have execution therefore; and it is

ADJUDGED THAT a constructive trust and a constructive or equitable lien is imposed on all right, title, and interest of defendants' Geisler and Roberdeau and their affiliates (the named General Partners, Geisler Roberdeau, Inc. and Stage Fright LLC) in and to the Projects (except insofar as those rights, title and other properties for which any or all of that $1,500,000 was disbursed to the extent of the sum of that money so disbursed; and it is

ADJUDGED that defendants and anyone acting in concert, under their supervision, or at their direction are enjoined from doing or permitting to be done directly or indirectly, the transferring, pledging, hypothecating or otherwise disposing of any right to or in the Projects or any payments or receipts from any source with respect to or in connection with the Projects (whether purported producer fees or otherwise) or in any other right or property in which plaintiffs have a constructing or equitable lien, except monies that defendants cause to be paid directly to and deposited in a bank account established by plaintiffs for the Partnership, and defendants shall have no control over nor power to authorize or make any disbursements from such bank account; and it is further

ADJUDGED that defendants are enjoined from doing or permitting to be done, anything which purports to indicate or may mislead anyone into believing that defendants or any of their affiliates is a general partner of the Partnership or has any right, title, or interest in or to any of the Projects, as all such rights, title, and interest are vested in and belong to the Partnership; and it is

ADJUDGED that defendants immediately, but in any event not later than 20 days after signature of an order settled on this decision deliver to plaintiffs in writing a full, complete and correct accounting from defendants of (a) all rights to and proceeds of each of the Projects and of all disbursements purportedly made by defendants and their affiliates with respect to the Projects (including without limitation all payments made to or for Geisler Roberdeau Inc., The White Hotel Partnership, and Stage Fright LLC from any of the $1,500,000 received from Phoenix Pictures), (b) all accounts, projects rights, and other properties for or as to which those monies were disbursed, and (c) all documents supporting that accounting and it is

ADJUDGED, that defendants immediately, but in any event not later than 10 days after signature of an order based on this decision deliver to plaintiffs all screenplays, stage plays, treatments, and agreements with respect to the Projects, and immediately, but in any event not later than 30 days after the date of this Order, deliver to plaintiffs all correspondence, notes, memoranda, books and records, and other documents relating to the

Partnership or to the Projects since they belong to and are the property of the Partnership; and it is

ORDERED that the accounting ordered hereunder and the production of partnership books and records is referred to the Legal Support Office, Room 311, for assignment to a referee who shall hear and report with recommendations as to the compliance by defendants with the production of partnership books and records and the accounting.

HAROLD TOMPKINS,
J.S.C.

APPENDIX F

JUDGMENT AND ORDER OF THE NEW YORK SUPREME COURT

As Recorded in the United States Copyright Office on June 8, 2006, Volume 3539, Doc. No. 914

At IAS Part 3 of the Supreme Court of the State of New York, County of New York, held at the Courthouse thereof, 60 Centre Street, New York, New York 10007 on the 9 day of May, 2006

PRESENT:

THE HONORABLE KARLA MOSKOWITZ, Justice

_____x

BRIARPATCH LIMITED, L.P. and GERARD F. RUBIN,
Plaintiffs
-against-
D. M. THOMAS,
D. M. THOMAS LTD.,
BRIARPATCH FILM CORP.,
ROBERT M. GEISLER,
VERNER SIMON, P.C,
PAUL W. VERNER, and
NIGHT HAWK LIMITED,
Defendants

Index No. 603364/01
(Motion Sequence No. 24)

_____x

JUDGMENT AND ORDER

UPON READING AND FILING the Notice of Motion dated February 15, 2006 of Plaintiffs Briarpatch Limited, L.P. and Gerard F. Rubin to Reject and Amend Certain Erroneous and

Unsupported Findings of Fact and to Correct Certain Typographical Errors in, and Then Confirm as So Amended and Corrected, the Report of the Honorable Louis Crespo, Special Referee dated February 2, 2006" and Exhibit A to the Notice of Motion and having read and filed the Affidavit dated February 15, 2006 of Barry L. Goldin, Esq. and Exhibits A through G thereto and the affirmations of service with respect thereto, and the Motion having regularly come before this Court on March 30, 2006 and oral argument having been held thereon on March 30, 2006, and Defendants NIGHT HAWK LIMITED and ROBERT M. GEISLER, although duly served with process, having failed to appear, answer the Second Amended Complaint, oppose the aforesaid Motion, or otherwise appear, and this Court having rendered and filed its written decision on March 30, 2006;

NOW, on said Motion of BARRY L. GOLDIN, attorney for Plaintiffs BRIARPATCH LIMITED, L.P. and GERARD F. RUBIN to modify as set forth on Exhibit A hereto (the "Modifications") the February 2, 2006 Report of the of the Honorable Louis Crespo, Special Referee set forth on Exhibit B hereto (the "February 2, 2006 Report") and to then confirm the February 2, 2006 Report as so modified by the Modifications, said Motion is hereby granted; and it is further

ORDERED, that the first sentence of Finding No. 2V in the February 2, 2006 Report is so amended to read as follows:

> "Defendants Geisler and Roberdeau borrowed $100,000 personally from Michael Medavoy in March 1995. To obtain that $100,000 loan, defendants pledged to Medavoy

> The Thin Red Line, The White Hotel, and The English Speaker. They represented to Medavoy that they "own all right, title and interest in and to the screen and ancillary rights to [those] Properties ..., subject to the underlying rights acquisition agreements".

; and it is further

ORDERED, that the first three sentences of Finding No. 2VII in the Referee's February 2, 2006 Report are so amended to read as follows:

> "As this Court has previously adjudicated, The Thin Red Line Project was acquired and became owned by the Partnership as of January 1, 1994 (Ex. A, July 12, 1999 Decision, p, 27-28; Ex. B, October 14, 1999 Judgment, p. 1-2). Neither Geisler, nor Roberdeau nor Geisler Roberdeau, Inc. was ever a partner of the Partnership (Ex. A, Findings of Fact No.s 1-2,11, 49). Briarpatch Film Corp. had been dissolved prior to 1994 (Ex. A, Finding of Fact No. 2); upon its dissolution ceased to be a general partner of the Partnership [Ex. A, Conclusion of Law No. 15, applying N.Y. Revised Limited Partnership Act §121-402(i)]; and so by 1994 had ceased to be a general partner of the Partnership. Nonetheless, non-partners Geisler, Roberdeau, Geisler Roberdeau, Inc., and Briarpatch Film Corp. entered into an Option Agreement with Phoenix Pictures, Inc. dated as of April 1, 1996 pursuant to which they purported to grant Phoenix Pictures, Inc. an option to purchase a quitclaim of their

rights (if any) in The Thin Red Line screenplay and Project for $800,000 and also arranged for themselves to be paid a purported producers fee of $600,000, plus deferred and contingent compensation, and expense reimbursements (Ex. A, Finding No.s 45-46). As neither Geisler, Roberdeau, Geisler Roberdeau, Inc., nor Briarpatch Film Corp. was a general partner of the Partnership, that Option Agreement did not grant, and none of them (neither Geisler, Roberdeau, Geisler Roberdeau, Inc., nor Briarpatch Film Corp.) assigned to Phoenix Pictures, Inc., any of the screenplays or agreements or other rights of the Partnership (whether for The Thin Red Line Project or otherwise); rather, as this Court adjudicated, those "screenplays, ... agreements, ... and other documents ...belong to and are the property of the Partnership" (Ex. A, p. 29-30; Ex. B, p. 4). The Court determined that the $600,000 "producer's fee" was not for "services as producers" and that "defendants [Geisler and Roberdeau] negotiated for themselves to be paid that $600,000" (Ex. A, Finding No.s 53-54)."

; and it is further

ORDERED, that the second sentence of Footnote 5 of the Referee's February 2, 2006 Report is so amended to read "Many of those 50,000 documents were not produced in whole or in part."; and it is further

ORDERED, that in Findings No.s 2V through 2XVI of the Referee's February 2, 2006 Report, the name which erroneously appears as "Phoenix Productions, Inc." is changed to the correct name of Phoenix Pictures, Inc.; and it is further

ORDERED, that in the second line of Finding No. 71 of the Referee's February 2, 2006 Report, the typo in the word "indicated" is corrected by changing "indicted" to "indicated"; and it is further

ORDERED, that the typo in Conclusion of Law No. 7 on page 31 and No. 25 on page 36 of the Referee's February 2, 2006 Report is corrected by changing the name of plaintiffs' attorney to "Goldin" (from "Gordin"); and it is further

ORDERED and ADJUDGED that the February 2, 2006 Report of the Special Referee, as hereinabove modified, is confirmed; and it is further

ORDERED and ADJUDGED that each of the recommendations of the Honorable Louis Crespo, Special Referee set forth in items A through C on pages 39-40 of the Referee's February 2, 2006 Report is adopted, as hereinbelow set forth; and it is further

ADJUDGED, that plaintiffs BRIARPATCH LIMITED, L.P. and GERARD F. RUBIN are awarded damages against and recover from defendant NIGHT HAWK LIMITED, alter ego of defendant ROBERT M. GEISLER, the amount of $4,350,000 (Four Million Three Hundred and Fifty Thousand Dollars) with respect to The White Hotel Project, plus interest accruing thereon at the

statutory rate of 9% per annum from March 1, 2003 through March 31, 2006 as computed by the Clerk in the sum of $1,208,823.29 for a total award as of March 31, 2006 in the sum of $5,558,823.29 and that plaintiffs have execution therefore; and it is further

ADJUDGED, that plaintiffs BRIARPATCH LIMITED, L.P. and GERARD F. RUBIN are awarded damages against and recover from defendant NIGHT HAWK LIMITED, alter ego of defendant ROBERT M. GEISLER, the amount of $200,000 (Two Hundred Thousand Dollars) with respect to The Peter Pan/The Boy Castaways Project, plus interest accruing thereon at the statutory rate of 9% per annum from March 1, 2003 through March 31, 2006 as computed by the Clerk in the sum of $55,578.08 for a total award as of March 31, 2006 in the sum of $255,578.08 and that plaintiffs have execution therefore; and it is further

ADJUDGED, that in light of defendant NIGHT HAWK LIMITED's knowing and intentional disobedience of the order to provide accountings, failure to provide Court-ordered discovery, and failure to otherwise comply with discovery obligations in the instant action, plaintiffs BRIARPATCH LIMITED, L.P. and GERARD F. RUBIN are awarded and recover, pursuant to Civil Practice Law and Rules §3126, reimbursement from defendant NIGHT HAWK LIMITED, alter ego of defendant ROBERT M. GEISLER, fees and costs incurred in the amount of $51,921.58 (Fifty one Thousand Nine Hundred Twenty One Dollars and Fifty-eight Cents); and it is further

ADJUDGED that defendant NIGHT HAWK LIMITED and defendant ROBERT M. GEISLER have been and are alter egos of each other, and that the damages awarded against and to be recovered from defendant NIGHT HAWK LIMITED in this Judgment and Order are also awarded against and to be recovered from defendant ROBERT M. GEISLER, jointly and severally; and it is further

ORDERED, that the action as to remaining defendants VERNER SIMON P.C. and PAUL W. VERNER be severed and continue against said defendants VERNER SIMON, P.C and PAUL W. VERNER; and it is further

ORDERED, that plaintiffs BRIARPATCH LIMITED, L.P. and GERARD F. RUBIN are directed to notify counsel for said defendants VERNER SIMON, P.C. and PAUL W. VERNER of a preliminary conference set for April 25, 2006 at 11:00 a.m. in this Court; and it is further

ORDERED, that the Clerk of Court shall enter Judgment in accordance herewith.

KARLA MOSKOWITZ,
J. S. C.

APPENDIX G.
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 24th day of April, two thousand and nine,

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ORDER
Docket Number 07-5536-cv
FILED: April 24, 2009

Briarpatch Limited LP
and Gerard F. Rubin,
Plaintiffs-Appellants,
v.
Phoenix Pictures, Inc.,
and Morris "Mike"
Medavoy,
Defendants-Appellees,
Geisler Roberdeau, Inc.,
Defendant

---x

Appellants Briarpatch Limited LP & Gerard F. Rubin having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk